JUN 17 1940
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 158

JESSE C. BADER,

Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

WM. SCOTT STEWART,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Nature of the case	2
Exhibit "A"—Opinion of the Supreme Court of the State of Illinois	4

Case Cited.

People v. *Fisher*, 340 Ill. 250	2

Statutes Cited.

Constitution of Illinois of 1818:	
Article 8, Section 6	2
Constitution of Illinois of 1848:	
Article 13, Section 6	2
Constitution of Illinois (present):	
Article 2, Section 5	2
Article 2, Section 9	2
Constitution of the United States, 14th Amendment	2, 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 158

JESSE C. BADER,

Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

STATEMENT OF JURISDICTION.

Appellant was prosecuted by indictment, charged with the crime of manslaughter, and by final judgment of the Criminal Court of Cook County was sentenced to the penitentiary. Appellant thereafter sued out a writ of error in the Supreme Court of Illinois which was made a supersedeas, and appellant is now on bail fixed at $10,000 with sureties approved by said court. The judgment of the Criminal Court of Cook County was affirmed. A petition for rehearing was duly filed and overruled on December 6, 1939, at which time the judgment above referred to was made final, insofar as the Supreme Court of Illinois is concerned, and a stay of mandate was later allowed in order that this petition might be made.

Section 6 of Article 8 of the Constitution of 1818 and Section 6 of Article 13 of the Constitution of 1848 (of Illinois) provided that the right of trial by jury should remain inviolate. Section 5 of Article 2 of the present Constitution, "The right of trial by jury as heretofore enjoyed shall remain inviolate." Section 9 of the same article provides that in all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. This right to a speedy public trial is incorporated in the same section with other constitutional rights of a person accused of crime, namely, to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses face to face and to have process to compel the attendance of witnesses in his behalf. Each of the two earlier constitutions contained similar provisions. Const. 1818, art. 8, sec. 9; Const. 1848, art. 13, sec. 9.

In the case at bar, appellant waived a trial by jury in the trial court. In the Supreme Court of Illinois, by his 4th and 5th assignment of error (Abstract Page 40), he contended that when the jury was waived and the court attempted to sit without a necessary part of the court under the laws and the constitution of the State, the court was without jurisdiction, and appellant was deprived of due process of law as guaranteed by the XIV Amendment of the Constitution of the United States. This contention was duly briefed and argued by appellant and disposed of contrary to the contention of appellant, the Supreme Court of Illinois having relied upon the case of *People* v. *Fisher*, 340 Ill. 250.

So therefore appellant claims that the trial court was without jurisdiction for the reason that no jury was called; that the Statute of Illinois making a jury judges of the law, as well as the facts in criminal cases, is constitutional

and makes a jury indispensable where a plea of not guilty is interposed. Appellant claims that the affirmance of the judgment against him by the Supreme Court of the State of Illinois deprived appellant of due process of law as guaranteed by the XIV Amendment of the Constitution of the United States.

WM. SCOTT STEWART,
Counsel for Appellant.

EXHIBIT "A".

Docket No. 25200—Agenda 1—June, 1939.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

v.

JESSE C. BADER, Plaintiff in Error.

MR. JUSTICE SHAW delivered the opinion of the court:

On August 26, 1938, Richard Fleming, an eight-year-old boy, a pedestrian, then crossing Washington boulevard at its intersection with Ridgeland avenue in the village of Oak Park, was struck and instantly killed by an automobile which the defendant was then driving. An indictment charging defendant Bader with manslaughter based upon these facts was returned in the criminal court of Cook county. Thereafter, on trial before the court and without a jury, the defendant was found guilty, judgment on that finding was entered against him and he was sentenced to the penitentiary for an indeterminate term of one to fourteen years. This writ of error seeks a reversal of that judgment.

To secure such a reversal two principal contentions are made: First, that the finding does not prove the defendant guilty beyond a reasonable doubt and, second, that a jury is an indispensable part of a court in the trial of a criminal case, upon which it is urged that our holding to the contrary in *People* v. *Fisher*, 340 Ill. 250, was wrong and should be overruled.

The evidence is so clear and convincing that we will not state it in detail. An examination of the record shows that eight witnesses for the People testified that the defendant drove through a red light at the intersection where the boy was killed and these witnesses all estimated the speed of his car at from forty to fifty miles an hour. Some of these witnesses identified the defendant as the driver and they all agreed that the driver neither slackened his speed nor appeared to make any effort to stop at the time in question. Two of these witnesses testified that they pur-

sued the fleeing car for several blocks, but lost it in traffic. It was further proved that the car which had caused the accident and which was owned by the defendant, was found by the police two or three days later in a garage near his home, with the radiator grill dented and partially bashed in and still showing traces of blood and hair.

The defendant testified in his own behalf that he was returning to Chicago at the time of the accident, which was late in the afternoon, but still daylight, and that he and his housekeeper had made a round trip from Chicago to St. Louis that day. He testified he did not remember having gone through a red light and that if he struck any one he did not know it and was not traveling at an excessive rate of speed at the time and place in question. However, several of the witnesses for the People identified him as the driver of the car and his own testimony showed that he had traveled that particular boulevard at about the time of the accident.

We will not reverse a conviction on a question of fact unless, upon the entire record, we feel there is a grave and substantial doubt as to the guilt of the defendant, nor will we, under such circumstances as are disclosed by this record, attempt to substitute our judgment for that of the trial court or jury which heard the evidence and saw the witnesses. (*People* v. *Fortino,* 356 Ill. 415; *People* v. *Bolger,* 359 id. 58; *People* v. *Mangano,* 356 id. 178.) The record in this case fully sustains the findings of the trial court.

As to defendant's second contention,—*i. e.,* that a jury is an essential part of a court in the trial of a criminal case and that it cannot be waived by defendant, we have only to say that we held to the contrary in *People* v. *Fisher, supra;* that all of the arguments now urged were considered and decided in that case and that we adhere to what we then held.

The judgment of the criminal court of Cook county is affirmed.

Judgment affirmed.

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FILED
JUN 17 1940
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 158

JESSE C. BADER,

Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

JOHN E. CASSIDY,
Attorney General of Illinois.

A. B. DENNIS,
Assistant Attorney General.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1
Motion to dismiss	4

Table of Cases Cited.

Patton v. *United States*, 281 U. S. 276	2
People v. *Fisher*, 340 Ill. 250	2

Statutes Cited.

Constitution of Illinois, Article II:	
Section 5	1
Section 9	2
Constitution of the United States, 14th Amendment	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 158

JESSE C. BADER,

Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

STATEMENT DISCLOSING MATTER OR GROUNDS MAKING AGAINST THE JURISDICTION OF THIS COURT ASSERTED BY THE APPELLANT AND MOTION BY APPELLEE TO DISMISS APPEAL.

The grounds upon which appellant contends this Court has jurisdiction of this case are based upon the fact that the appellant waived a trial by jury in the Criminal Court of Cook County and was tried by the court without a jury.

Counsel for appellant contends that this was in violation of Section 5 of Article II of the Constitution of Illinois, which provides:

> "The right of trial by jury as heretofore enjoyed shall remain inviolate."

Counsel for appellant also contends that this was in violation of Section 9 of Article II of the Constitution of Illinois, which provides, among other things, that:

> "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Counsel for appellant further contends that the trial of appellant by the court, without a jury, was the denial of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, which provides, in part, as follows:

> "* * * nor shall any state deprive any person of life, liberty or property, without due process of law, * * *."

These contentions of counsel for appellant are unsound and untenable for the reason that the Supreme Court of the State of Illinois, in the case of *People* v. *Fisher*, 340 Ill. 250, at page 265, held:

> "* * * that the defendant in a criminal prosecution, whether the charge be a felony or a misdemeanor, has the power, upon a plea of not guilty, to waive a jury trial; and we do not adhere to what was said to the contrary in the cases of *Harris* v. *People, supra; Morgan* v. *People, supra; Brewster* v. *People, supra; Paulsen* v. *People, supra.*"

This case was very largely predicated upon the case of *Patton* v. *United States*, 281 U. S. 276. In this case, the Supreme Court of the United States said, at pages 296, 297:

> "The record of English and colonial jurisprudence antedating the constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as

distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the king and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law,' nevertheless looked upon it as a 'privilege,' albeit 'the most transcendent privilege which any subject can enjoy,' Book 3, p. 379. And Judge Story, writing at a time when the adoption of the constitution was still in the memory of men then living, speaking of trial by jury in criminal cases said: 'When our more immediate ancestors removed to America, they brought this great *privilege* with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental *right*, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' (2 Story on the Constitution, sec. 1779.) In the light of the foregoing it is reasonable to conclude that the framers of the constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. If not, and their intention went beyond this and included the purpose of establishing the jury for the trial of crimes as an integral and inseparable part of the court, instead of one of its instrumentalities, it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time. This is all the more remarkable when we recall the minute scrutiny to which every provision of the proposed constitution was subjected. The reasonable inference is that the concern of the framers of the constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative. That

this was the purpose of the third article is rendered highly probable by a consideration of the form of expression used in the sixth amendment."

From these authorities it seems clear that there was no denial of due process of law in this case and that this Court has no jurisdiction in the matter. The People of the State of Illinois, appellee, therefore move the Court to dismiss the appeal in this case for want of jurisdiction.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

By JOHN E. CASSIDY,
Attorney General of the State of Illinois.

A. B. DENNIS,
Assistant Attorney General,
Of Counsel

Vol 311

Office - Supreme Court, U. S.
FILED
JUN 28 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY
AND ÆTNA CASUALTY & SURETY COMPANY,
Appellants,

vs.

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

WM. M. HALL,
Counsel for Appellants.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision believed to sustain jurisdiction	1
Statutes of the State of Mississippi the validity of which is involved	2
Date of judgment and of application for appeal	2
Nature of the case and ruling of the Supreme Court of Mississippi	3
Cases relied upon to sustain the jurisdiction of this Court	8
Appendix A—Opinion dated October 9, 1933	9
Appendix B—Opinion dated May 8, 1939	14
Appendix C—Opinion dated April 29, 1940	25
Dissenting opinion	41

Table of Cases Cited.

Blake, In re, 175 U. S. 114, 44 L. Ed. 94	8
Chaffin v. *Taylor*, 116 U. S. 567, 29 L. Ed. 727	8
Georgia Ry. & Elec. Co. v. *City of Decatur*, 297 U. S. 620, 80 L. Ed. 925	8
Hartford Accident & Indemnity Co. v. *Delta & Pine Land Co.*, 169 Miss. 196, 150 So. 205	5
Hartford Accident & Indemnity Co. v. *Delta & Pine Land Co.*, 188 So. 539	6

Statutes Cited.

Constitution of the United States, Article 1, Section 10	5
Constitution of the United States, Article 4, Sec. 1	5
Constitution of the United States, Fourteenth Amendment	5
Judicial Code, Section 237, as amended (28 U. S. C. A. 344)	1, 2
Mississippi Code of 1930:	
Section 2294	2, 5
Section 5131	2, 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY AND ÆTNA CASUALTY & SURETY COMPANY,
Appellants,

vs.

DELTA & PINE LAND COMPANY.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES UPON APPEAL TO REVIEW JUDGMENT OF THE SUPREME COURT OF MISSISSIPPI.

Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company submit in compliance with Rule 12 of the Supreme Court of the United States the following statement of the basis of the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment of the Supreme Court of Mississippi in the above entitled cause.

A.

Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section

237, amended, Judicial Code, being Section 344, U. S. C. A. Title 28. The Supreme Court of the United States took jurisdiction thereunder of an appeal to the October Term, 1933, in this cause, and reversed the judgment appealed from and remanded the cause for further proceedings not inconsistent with its opinion, and this appeal is from the judgment thereafter rendered on the ground that the court below did not comply with its opinion and mandate.

B.

Statutes of the State of Mississippi the Validity of Which Was Involved.

The statutes of Mississippi the validity of which as applied to the bond sued upon, drawn in question as being repugnant to the United States Constitution, were Sections 5131 and 2294 of the Mississippi Code of 1930, Section 5131 providing, in substance, that "all contracts of insurance on property, lives or interest in this State shall be deemed to be made therein", and Section 2294, that "any change whatsoever in statutory limitations made by contract stipulation would be absolutely null and void". The Supreme Court of the United States held that the application of these statutes to the contract sued upon violated the Due Process Clause of the Constitution.

C.

Date of Judgment and Application for Appeal.

The judgment of the Supreme Court of Mississippi sought to be reviewed, was rendered on the 29th day of April 1940, and the application for appeal was presented on the 22nd day of May 1940, this Statement of Jurisdiction being presented therewith.

D.

Nature of the Case and Ruling of the Supreme Court of Mississippi.

Appellee, Delta & Pine Land Company, suer Appellant Hartford Accident & Indemnity Company, in a Circuit Court of Mississippi, upon a fidelity bond to recover a loss sustained through the fraud of an employee.

Appellant in said bond bound itself "to pay" to Appellee, "within 60 days after satisfactory proof thereof, such pecuniary loss * * * sustained * * * through the fraud * * * committed * * * by any of the employees named upon the Schedule attached * * *, in any position, any where, during the period commencing with the respective dates set opposite the names of the employees in such Schedule, and ending with the termination of the suretyship for any employees by his dismissal or retirement from the service of the employer by the discovery of loss hereunder, or by cancellation by the employer or the Surety".

It was provided therein that "upon the discovery by the employer of any dishonest act on the part of any employee, the employer shall give immediate written notice thereof to the Surety at its Home Office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its Home Office within three months after such discovery", and further, that "any claim hereunder must be duly made upon the Surety within fifteen (15) months after the termination of the Suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the Surety after the expiration of twelve (12) months after the filing of proof of loss as above required".

Appellee in its declaration alleged that it sustained loss through divers acts of fraud on the part of its Treasurer, one

Harris, committed in Mississippi, during the currency of the bond, and that it had complied with all the terms of the bond and Appellant had refused to make payment of the sum demanded.

Appellant set up in its plea thereto that Appellee had its principal office and was doing business in Tennessee and that appellant had an agency and was doing business in Tennessee and that the bond was made between them there and that it was a Tennessee contract governed by the laws of Tennessee and that full faith and credit must be given thereto in the courts of Mississippi, in accordance with the requirements of Article 4, Section 1; Article 1, Section 10 and Section 1 of the Fourteenth Amendment of the Constitution of the United States, and that there was no statute in Tennessee prohibiting or invalidating the condition or limitation in the contract, to the effect that any claim thereunder must be duly made upon the defendant as surety within fifteen months after termination of the suretyship for the defaulting employee, and that plaintiff did not make claim upon appellant for the loss within fifteen months after termination of the suretyship for Harris, as the contract was canceled and terminated December 31, 1929 and no claim was made until June 22, 1931.

Appellee demurred to that plea as not sufficient in law to bar its action, and assigned as causes, (1) that the construction and validity of the provision of the contract relied upon in the plea, was to be determined by the laws of Mississippi, not by the laws of Tennessee; and (2) that the statute of limitations of the State where the suit was brought governed the time for bringing the action and the contract provision relied upon, violated Section 2294 of the Mississippi Code and the public policy of Mississippi and this court was not required to give full faith and credit to

this provision of the contract by Article 4, Section 1; Article 1, Section 10 or Section 1 of the Fourteenth Amendment of the Constitution.

The Circuit Court sustained the demurrer and appellant declining to plead further, rendered judgment in favor of appellee, after having had damages assessed by a jury.

Appellant appealed therefrom to the Supreme Court of Mississippi and that court held that it was to be conceded that under the decisions of the Supreme Court of Tennessee the provision relied upon was a limitation of liability but that the converse was true in Mississippi and that while the contract was made in Tennessee, the loss was sustained in Mississippi and Code Section 5131 made it a Mississippi contract and the Mississippi laws applicable thereto and the provision relied upon violated Code Section 2294, and accordingly affirmed the Circuit Court's judgment. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 169 Miss. 196, 150 So. 205.

Appellant appealed therefrom to the United States Supreme Court, October Term, 1933, and the Supreme Court of the United States held that appellant had a right under said provision, lawfully vested in Tennessee, which Mississippi could not nullify with its statutes, without deprivation of due process, and so to do, construed, as had the Supreme Court of Mississippi, said provision, under the Tennessee decisions, to be a condition of substantial importance, lawful in Tennessee, and going to the obligation of the contract, which was to say that it was a condition precedent, in that compliance therewith was essential to recovery upon the bond, and that appellant's defense of non-compliance set up in its plea which had been demurred to, was sufficient in law to bar appellee's action, and remanded the cause for further proceedings not inconsistent with its opinion. 292 U. S. 143, 78 L. Ed. 1178.

The Supreme Court of Mississippi reversed its former decision and remanded the cause without an opinion to the Circuit Court for further proceedings.

The Circuit Court allowed appellee to file four replications, in three of which it set forth anew and also urged additional grounds for the contention that the contract was a Mississippi contract, governed by the laws of Mississippi, and in the fourth that under the Tennessee decisions, compliance with the provision relied on in appellee's plea as a bar to recovery was not a condition precedent to liability. After demurrers to three of the replications were overruled, issue was joined.

The case was tried to the court without a jury. There was no conflict in the evidence upon any material point. It was agreed that there was no statute in Tennessee that prohibited or made invalid the provision relied upon, and it was undisputed that appellant's suretyship for appellee's employee, Harris, and all of its other employees, was terminated December 31, 1929, and that claim was not made upon appellant until June 22, 1931.

Both sides moved for judgment. The court, in substance, held that the bond was not a Tennessee contract but if it was, that under the Tennessee decisions the provision relied upon was not a condition precedent and compliance therewith was not essential to a recovery and gave appellee a judgment against appellant.

Appellant appealed from that judgment to the Supreme Court of Mississippi and Division B of that court heard the cause and on the 8th day of May, 1939, held in substance and effect, that under the opinion and mandate of the Supreme Court of the United States, the judgment in the Circuit Court should have been for appellant, and pursuantly reversed the judgment of the Circuit Court and rendered judgment for appellant. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 188 So. 539.

The court, Division B, thereafter upon appellee's filing a suggestion of error, to the effect that the court had based its holding upon the matters set up in the three replications referred to and had not passed upon the matter set up in the fourth replication, remanded the cause to the docket for argument before Division A of the court. Division B thereafter, before argument of the cause to Division A, set aside its judgment for appellant.

After argument of the cause before Division A, the court in banc, with Justice Ethridge, Presiding Justice of Division B, dissenting, held in substance and effect that under the Tennessee decisions, the provision relied upon by appellant in its plea was not a condition precedent and that compliance therewith was not necessary to a recovery, and that that proposition was not in issue and was not involved in the matters considered by the Supreme Court of the United States and was not decided by that court, and accordingly affirmed the judgment of the Circuit Court and entered judgment against appellant and its appeal surety, Aetna Casualty & Surety Company. Justice Ethridge in his dissenting opinion held, in substance and effect, that the proposition in question was before the Supreme Court of the United States and had been decided by that court and that its decision was the law of the case and was binding upon the Supreme Court of Mississippi and it had acquiesced therein, when it reversed its formed judgment and remanded the cause without any further opinion, to the Circuit Court for trial in accordance with the opinion and mandate of the Supreme Court of the United States.

Appellant's present appeal from that judgment to the Supreme Court of the United States, involves the question whether the Mississippi courts complied with the opinion and mandate of the Supreme Court of the United States.

E.

Cases Sustaining Jurisdiction of the Supreme Court of the United States.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States upon this second appeal, to review the judgment of the Supreme Court of Mississippi rendered April 29, 1940: *Chaffin* v. *Taylor*, 116 U. S. 567, 29 L. Ed. 727; *Re Blake*, 175 U. S. 114, 44 L. Ed. 94; *Georgia Railway & Electric Co.* v. *City of Decatur*, 297 U. S. 620, 80 L. Ed. 925.

In *Georgia Railway & Electric Co.* v. *City of Decatur, supra*, the Court not only indicates that a second appeal gives jurisdiction of the cause to review the State Court's final judgment, to determine whether it is consistent with its opinion and mandate, but also where it had announced a construction of its own, the State court's contrary construction would not be a compliance with its opinion and mandate.

WM. M. HALL,
Counsel for Appellants.

APPENDIX A.

IN THE SUPREME COURT OF MISSISSIPPI.

No. 30,445.

Division A. McGowen, J.

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

DELTA & PINE LAND COMPANY

A judgment was recovered against Hartford Accident & Indemnity Company, the appellant, in a suit based on a declaration filed by the Delta & Pine Land Company upon a fidelity bond covering officers and employees of the Delta & Pine Land Company for various sums set opposite the names of these officers and employees in a schedule attached to the bond and known as a Fidelity Schedule Bond. The appellant was at the date of the contract, and since, authorized to do business in this state, and subject to process therein.

The appellee, Delta & Pine Land Company, sought to recover $2,703.79 because of the alleged default of H. H. Harris, listed in all the schedules as the treasurer of the appellee at Memphis, Tennessee, and whose fidelity was indemnified by the Hartford Accident & Indemnity Company in the sum of $25,000.00. The contract of indemnity was amended from time to time, but at all times it appeared that H. H. Harris, Treasurer, was located at Memphis, Tennessee.

In the declaration it was alleged that subsequent to the contract of indemnity the Delta & Pine Land Company removed its office from Memphis, Tennessee, to Scott, Mississippi. The defalcations of Harris, the treasurer, for which liability was sought to be enforced against the indemnity company, were alleged to have occurred on various dates between May 9, 1929 and September 20, 1929, and all occurred in Bolivar County, Mississippi. It was further

alleged that the appellee discovered these defalcations on May 24, 1931, and immediately gave notice thereof to the appellant, and within three months thereafter filed with the appellant at its home office at Hartford, Connecticut, affirmative proof of its loss, and brought its suit within twelve months of the filing of the proof of loss. The schedule shows employees covered by the fidelity bond at Memphis, Tennessee, Scott, Lamont, Deeson, Estill and Lake Cormorant, Mississippi. It further appears from the contract that the appellant indemnified the appellee, or the loss to it, for a specific sum as to each employee, as, for instance, H. H. Harris, Treasurer, Memphis, Tenn., $25,000.00.

The bond contained the following provision: "Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."

The bond also contained the following provision: "The Hartford Accident and Indemnity Company, (hereinafter called Surety), in consideration of an agreed premium, binds itself to pay to Delta & Pine Land Co., of Mississippi, and/or Delta Farm Co., and/or Empire Plantation Co. (as their interest may appear) (hereinafter called the Employer), within sixty (60) days after satisfactory proof thereof, such pecuniary loss as the Employer shall have sustained of money or other personal property (including money or other personal property for which the Employer is responsible) through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication committed directly or in connivance with others by any of the employees named upon the schedule attached hereto and made a part hereof, in any position, anywhere, during the period commencing with the respective dates set opposite the names of the employees in such schedule, and ending with the termination of the suretyship for any em-

ployee by his dismissal or retirement from the service of the Employer, by the discovery of loss hereunder, or by cancellation by the Employer or the Surety."

The appellant filed the following plea:

"Now comes Hartford Accident & Indemnity Company and for plea says that plaintiff should not have its action because plaintiff before and at the date of the contract of suretyship herein sued upon was doing business in the State of Tennessee and had its principal office at Memphis, in said State, and defendant was also then, as it is now, doing business in the State of Tennesee and had an Agency at Memphis, in said State, and plaintiff through its said office at Memphis, in said State, applied to defendant through its said Agency at Memphis, in said State, for said bond, rider and schedules containing the name of the defaulting employee, H. H. Harris, constituting said contract of suretyship, and defendant through its said Agency at Memphis, executed and delivered the same to plaintiff at its said office at Memphis, in said State, and said contract is a Tennessee contract and is governed by the laws of Tennessee and full faith and credit must be given thereto in the courts of this State under and in accordance with the requirements of Article 4, Section 1; Article 1, Section 10, and Section 1 of the Fourteenth Amendment of the Constitution of the United States, and there was not then and there is not now any statute in the State of Tennessee that prohibits and renders invalid the condition or limitation in said contract herein after mentioned, and the highest court of the State of Tennessee, to-wit, the Supreme Court, has held and announced as the law in Tennessee in a number of its decisions, towit, Guthrie *v.* Indemnity Association, 101 Tenn., 643; Phoenis Cotton Oil Co. *v.* Royal Indemnity Co., 140 Tenn., 438; City of Bristol *v.* Bostwick, 146 Tenn. 205, and other cases, that such conditions or limitations in such contracts are valid and binding; and said contracts of suretyship herein sued upon provided that any claim thereunder must be duly made upon the defendant, the surety, within (15) months after the termination of the suretyship for the defaulting employee, and plaintiff did not make claim for its loss upon defendant, the surety, within fifteen (15) months after the

termination of its suretyship for said defaulting employee, Harris, in that said contract of suretyship was canceled and thereby terminated December 31, 1929, and plaintiff did not make claim upon defendant until June 22, 1931; and this defendant is ready to verify."

To this plea the appellee filed a demurrer on the ground that the construction and validity of the provision requiring claim thereunder to be made within fifteen months after the termination of the suretyship for the defaulting employee was not to be determined by the laws of Tennessee, but by the laws of Mississippi, and that this provision violated Section 2294 of the Mississippi Code of 1930 and the public policy of Mississippi; and further that the courts of Mississippi were not required to give full faith and credit thereto under and in accordance with Article 4, Section 1; Article 1, Section 10; and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The court sustained the demurrer to this plea, the Indemnity Company declined to plead further, and thereupon judgment was rendered against it for the defalcation of Harris.

It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation of action. The converse is true in Mississippi, and the provision is a limitation of the action in this case our statute of limitation being for six years, Section 2294, Code 1930. Sovereign Camp, W. O. W. *v.* Miller, 125 Miss. 502, 87 So. 892; Standard Accident Insurance Co. *v.* Broom, 111 Miss. 409, 71 So. 653; Illinois Central R. R. Co. *v.* Jordan, 108 Miss. 140, 66 So. 406; General Accident, Fire and Life Ins. Co. *v.* Walker, 99 Miss. 404, 55 So. 404, 55 So. 51; Dodson *v.* Western Union Telegraph Co., 97 Miss. 104, 52 So. 693. The cases of Berry *v.* Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445, and New York Life Ins. Co. *v.* Alexander, 122 Miss. 813, 85 So. 93 are clearly differentiated from the others cited above, and in the case of Berry *v.* Lamar Life Ins. Co., supra, it is pointed out that he limitation there under review was a condition precedent to the liability imposed upon the insur-

ance company, and not a limitation upon the time in which the action should be brought.

Viewing the contract as a whole, there is no question but that this fidelity bond, or indemnity contract, was entered into and consummated in the State of Tennessee, where the Delta & Pine Land Company had its office and also the agent of the Indemnity Company had its office. The policy was delivered there, and so far as the language of the contract is concerned, as set forth in the statement of facts, this contract was a Tennessee contract. A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done. American Law Institute's Restatement of Law, Conflict of Laws, Tentative Draft No. 4, Sections 370 and 371. Couret *v.* Conner, 118 Miss. 374, 392, and authorities there cited. And where the contract is silent, the place of the making of the contract is presumed to be the place of performance,—in this case the payment by the indemnity company of any default of any of the employees of the appellee. See Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136.

But clearly under Section 5131, Code 1930, defining insurance, this indemnity bond is a contract of insurance within the purview of that statute; and, further, it being expressly provided therein that all contracts of insurance on property, lives or interests in this state shall be deemed to be made therein, in our judgment, makes the contract herein under review a Mississippi contract and solvable under the laws of this state. The contract here provided or stipulated that the appellee should be indemnified from loss by the defalcation of H. H. Harris in any position *anywhere*; and when he, the employee and the insured herein, removed to Mississippi and there defaulted, so far as the appellee is concerned its interest was insured or indemnified by the appellant in Mississippi, and, under the provision quoted from the above statute, became operative, and this state is obligated to enforce it, as a Mississippi contract, although it contained all the elements necessary to make it a Tennessee contract, but for the statute.

This court is committed to the proposition that if lives or property is insured in this state, although the contract be made in another state, the contract is solvable under

the laws of our own state. Fidelity Mutual Insurance Co. *v.* Miazza, 93 Miss. 18, 46 So. 817; Stuyvesant Ins. Co. *v.* Smith Motor Sales Co., 135 Miss. 585, 99 So. 575. The contract of indemnity in the case at bar, in our opinion, permitted the removal of employees to any place and indemnified against loss wheresoever it occurred. There being an interest of the appellee indemnified, and the employee having removed to Mississippi and his defalcation having occurred therein, whereby the appellee sustained a loss, and under the terms of the contract no notice of said removal being required, the contract became an indemnity contract against loss of interest of the appellee in this state. When the statute declares that such a contract shall be deemed to be made in this state, it means that the conflict of law between the two states is eliminated, and thereby, under the above authorities, a contract for fifteen months' notice was a limitation of the action enforcible as such in this state.

Affirmed.

Endorsed on back: 30445. Hartford Accident & Indem. Co. *v.* Delta & Pine Land Co. Filed 10/9/33. Tom Q. Ellis, Clk. 6½/11885.

APPENDIX B.

IN THE SUPREME COURT OF MISSISSIPPI.

No. 33,674.

Division B: 14074.

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

DELTA & PINE LAND COMPANY.

ETHRIDGE, *P. J.:*

This is the second appearance of this case in this Court. The former appeal and decision therein is fully stated, and dealt with in 169 Miss. 196, 150 So. 205. On that appeal the

Court held that the contract here involved, upon its face, and upon the facts stated, would be a contract under the laws of the state of Tennessee, where the contract of insurance or indemnity was effected; but for the effect that section 5131, Code of 1930, had upon insurance on property or persons in the state of Mississippi. On the former appeal the Court held that the Mississippi statute controlled, and affirmed the judgment of the court below against the Hartford Accident & Indemnity Company; from which judgment an appeal was taken to the Supreme Court of the United States, where the judgment of this Court was reversed, and the cause remanded to this Court for further proceedings. See Hartford Accident & Indemnity Co. *v.* Delta & Pine Land Co., 292 U. S. 143, 78 L. Ed. 1178, — Sup. Ct. —.

On the remand of the cause to this Court the case was reversed and remanded without an opinion, and sent to the Circuit Court for retrial; and coming on for trial there, the plea of the appellant, involved in the former suit, was replied to by three replications, which the Circuit Court allowed to be filed. Replication number one set up that the plaintiff in the suit, the Delta and Pine Land Company, was engaged in the sole business of farming in the state of Mississippi, where it operated plantations of approximately 38,000 acres, these plantations being the only source of revenue, and where all of its business was transacted; the offices in Tennessee being incidental, and subordinate to the business located in Mississippi. It denied that it had its business office in the state of Tennessee—that an office was temporarily located there as a matter of convenience, but was closed prior to the institution of suit, and prior to the default of its employe. The plea also set up that the principal business of the Hartford Accident and Indemnity Company was in the state of Connecticut, so far as the transactions involved with the defendant were concerned. And that it was not the intent of plaintiff or defendant that the contract of indemnity should be controlled by the laws of the state of Tennessee. Denied that the contract was a Tennessee contract; and that in the performance thereof, so far as the plaintiff and the defendant were concerned, the proofs were to be furnished to its Hartford, Connecti-

cut, office; and that naught was done as to the contract in the state of Tennessee "save a formal delivery affecting the rights and obligations as to the plaintiff"; but that the contract entered into by the defendants was for performance in the state of Mississippi; that the defendant well knew the requirement of the Mississippi law in regard thereto, and to that end contracted and agreed that any claim under the contract of indemnity must be duly made upon the surety within fifteen months after the termination of the suretyship for the defaulting employe; and that no further action or proceeding "shall be brought hereunder by the employer against the surety after the expiration of twelve months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law." That the premium exacted by the defendant for the said contract of indemnity had been delivered in Mississippi; and that defendant being affected with public use by reason of the nature of its business, should not be permitted to discriminate in the amount of premium charged; that since this was not a contract made under the laws of Tennessee, those laws were not integrated in the said contract.

For a second replication the plaintiff plead that the cause of action sued upon by the plaintiffs was for misappropriation of money belonging to the plaintiff by H. H. Harris, this being done in Mississippi, said Harris concealing such act from the plaintiff, the Delta and Pine Land Company; and it was not until April 21, 1931, that it was discovered through the exercise of reasonable diligence; that action based thereon being brought September 17, 1931; and that plaintiff should not be precluded from maintaining such suit.

For a third replication it was alleged that the defendant was doing business in the state of Mississippi, pursuant to the license granted to it therein; and that the defendant, pursuant to its license likewise granted by the State of Mississippi, specifically contracted and assented to the provisions of section 2294 and 5131, Code of 1930, previously construed by this Court, holding that the situs of the contract would have been, and was, within the state of Missis-

sippi; and that defendant contracted with the plaintiff for such indemnity, and received the premiums therefor, based on such contract; and such being the case, the Mississippi law in respect thereto should become binding; that the amount of business done in Mississippi represented the total business of the said corporation wherefor the indemnity was requisite, and the Mississippi law should control. That when the entire operation was conducted in Mississippi, after closing the temporary business office in Memphis, the defendant continued to hold the premium paid for the contract of indemnity, although aware that none of the business was being operated in Tennessee—that the plaintiff was not authorized to do business in that state. That the defendant permitted plaintiff to believe that the contract of indemnity was a local contract as to Mississippi, and that plaintiff was entitled to the contract under the laws of that state.

The Hartford Accident & Indemnity Company demurred to these pleas on the ground that they did not present a defense to the pleas interposed by the defendant, and that replications thereto would present immaterial issues, under the law. The demurrers were overruled in the Circuit Court, and the defendant joined issue upon the pleas. The cause proceeded to trial, resulting in a judgment in favor of the plaintiff for the amount of the defalcation, the cause being submitted to the Circuit Judge without jury for a decision as to both the law and the facts.

We think the court should have sustained the demurrers to the replications. They did not present a defense to the plea interposed by the defendant. The contract of indemnity was complete in the state of Tennessee, and the obligations of the contract, and its terms, became fixed, and were controlled by the law of that state. The application for a policy of indemnity was dated at Memphis, Tennessee, the employe indemnified, H. H. Harris, being at the time employed in that city, where the Delta and Pine Land Company had and maintained an office. The application for indemnity insurance was delivered to the agents of the Hartford Accident & Indemnity Company in Memphis, and was sent to the home office for approval, and for investigation, by the Company in the city of Hartford, Connecticut, where

the investigation was made, and the policy written and forwarded to its agents in Memphis, who thereupon delivered it to the Delta and Pine Land Company at its offices, then in the state of Tennessee. The contract of insurance was then complete, and covered indemnity for the fidelity of Harris, wherever he might be, when an act was done rendering the company liable under its policy.

The provisions of the contract here involved were sufficiently set out in the former appeal, and need not be repeated here. But in the former opinion, the Court, construing the contract, said: "Viewing the contract as a whole, there is no question but that this fidelity bond, or indemnity contract, was entered into and consummated in the state of Tennessee, where the Delta & Pine Land Company had its office, and also the agent of the indemnity company had its office. The policy was delivered there, and, so far as the language of the contract is concerned, as set forth in the statement of facts, this contract was a Tennessee contract. A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done. American Law Institute's Restatement of Law, Confl. of Laws (Tent. Draft No. 4), sections 370, 371; Couret *v.* Conner, 118 Miss. 374, 392, 79 So. 230, and authorities there cited. And, where the contract is silent, the place of the making of the contract is presumed to be the place of performance—in this case the payment by the indemnity company of any default of any of the employes of the appellee. See Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136."

The policy was delivered in the state of Tennessee, which was the last act fixing the contract and the obligations of the contract. The defalcations occurred in the year 1929, at which time Harris was in the state of Mississippi. The contract of indemnity terminated on the 31st of December, 1929, and the default of Harris was not discovered within the fifteen months provided for in the contract. The contractual stipulation reading; "Any claim hereunder must be duly made upon the surety within fifteen months after the termination of the suretyship for the defaulting employe, and no suit, action or proceeding shall be brought hereunder by the employer against the surety after the

expiration of twelve months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law."

We held the contract was valid under the laws of the state of Tennessee, and it devolved upon the Delta and Pine Land Company to comply with this stipulation within the time agreed upon. Fifteen months was ample time in which to investigate and determine whether or not there was a default on the part of Harris under the employment. The same method of investigation was then open to the Delta and Pine Land Company as when it finally discovered the defalcations of Harris; and had they pursued the method which they finally pursued, they would havediscovered the shortage within the prescribed period of time.

In the former opinion quoted from above it was held that although the contract on its face, and under the facts, would be a Tennessee contract, it was thought by our Court that section 5131, Code of 1930, made it a contract under the laws of this state. But therein the Court was in error, for which the Supreme Court of the United States reversed our former decision. In discussing the case the Supreme Court of the United States, at pages 149 and 150, 202 U. S., page 1181 of L. Ed., said: "It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employe whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract, and lawful in that

state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Ins. Co. *v.* Dick, supra; 281 U. S. 408, 74 L. Ed. 933, 50 S. Ct. 338, 74 A. L. R. 701), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made."

In Allgeyer *v.* State of La., 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832, the Supreme Court dealt with the right of a citizen of a state to procure insurance with a company not doing business in the state, the contract being made through the mails, or by other interstate means; and the Court held that under the Federal Constitution the liberty of a citizen to make a contract outside of the limits of the state in which he lives is guaranteed by the Fourteenth Amendment. The Court held in that case: "A state statute as construed by the highest state court, prohibits a citizen of the state, under an open policy of marine insurance, effected outside the state, in a foreign insurance company which has not complied with the state laws, from sending by mail or telegraph, while in the state, a notice describing particular goods then within the state, upon which he desires the insurance under the open policy to attach (Acts La., 1894, No. 66) operates to deprive such citizen of his liberty without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution."

In that case a trial was had upon an agreed statement of facts, from which it appeared as follows: "The Atlantic Mutual Insurance Company is a corporation, created by the laws of the state of New York and domiciled and carrying on business in that state, and the defendants made a contract with that company for an open policy of marine insur-

ance for $200,000.00, on account of themselves, and to cover cotton in bales purchased and shipped by them on which drafts might be drawn for the purchaser upon "Whom it might Concern." By the terms of the policy, among other things, it was stated: 'Shipments applicable to this policy, to be reported to this company by mail or telegraph the day purchased, warranted not to cover cotton in charge of carriers on shore or during inland transportation. No risk is to be insured by this policy until a letter signed by ——, and addressed to the president of this company, detailing the name of the vessel, particulars of the shipment, with description of the property and amount to be insured, is deposited in the postoffice at ——, which must be done while the property is in good safety, and in all cases prior to the departure of the risk from ——; a duplicate of such letter to be sent by the following mail. A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to E. Allgeyer & Company.'

"The Atlantic Mutual Insurance Company is engaged in the business of marine insurance, and has appointed no agent in the state of Louisiana, and has not complied with the conditions required by the laws of that state for the doing of business within the same by insurance companies incorporated and domiciled out of the state. On the 23rd of October, 1894 the defendants mailed to that company a communication, stating insurance was wanted by defendants for account of same (the open policy); loss, if any, payable at Paris, in French currency, etc., for $3,400 on 100 bales of cotton, which, at the time of the communication, were within the state of Louisiana. The premiums to be paid under the contract of insurance, and the loss or losses under the same, were payable in the city of New York, the premiums being remitted by the defendants from New Orleans by exchange. Defendants are exporters of cotton from the port of New Orleans to ports in Great Britain and on the continent of Europe. They sell cotton in New Orleans to purchasers at said ports. For the price of every sale of cotton made by them they, in accordance with the general custom of business, draw a bill of exchange against the

purchaser, attaching to the same the bill of lading for the cotton, and an order on the Atlantic Mutual Insurance Company for a new and separate policy of insurance, spoken of in the open policy, and the form of the said order is as follows:

'Attached to draft No. — on —, from E. Allgeyer & Co., New Orleans, 189, to Atlantic Mutual Ins. Co., New York. Marks and numbers, ——. Please deliver to —— or order special policy for $—— on —— bales cotton, per ——, from New Orleans to ——. Respectfully, (Signed) E. Allgeyer & Co. Per ——.' "

In the course of the opinion in this case the Court said: "Has not a citizen of a state, under the provisions of the federal constitution above mentioned, a right to contract outside of the state for insurance on his property,—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper case, supra, and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act,—one which the defendants were at liberty to perform, and which the state legislature had no right to prevent, at least with reference to the federal constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights

of the citizen which are protected by the federal constitution.

"In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto; and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it."

It is true that if a default occurred on the part of Harris, the employe, whose fidelity was guaranteed, the money should be paid to the Delta and Pine Land Company; and it may be assumed that it was contemplated that this payment was to be made in Mississippi rather than in the state of Tennessee. However, at the time of the execution of the contract the employe was in the state of Tennessee, performing certain duties there for the plaintiff, the Delta and Pine Land Company—the office having been there for ten or eleven years for the convenience of the Company in the operation of its business. We do not think the fact that the Delta and Pine Land Company had not obtained permission to do business in the state of Tennessee affected the rights of the defendant, the Hartford Accident & Indemnity Company, under this contract. The Delta and Pine Land Company could not set up its own default and wrongdoing to defeat the rights of the Hartford Accident & Indemnity Company, who, as the record shows, was au-

thorized to do business in the state of Tennessee; if the fact that the Delta and Pine Land Company did not have a right to do business in Tennessee cut any figure, it would probably defeat its right to maintain a suit on the policy. If the contract was the contract of the officers or agents or stockholders, as partners, then the corporation, as such, would not have a right thereunder to indemnity. Having made the contract in the state of Tennessee, and being in that state at the time, and doing a part of its business there, we think that fact would be immaterial, so far as the right of the Hartford Accident & Indemnity Company is concerned. The policy was issued to the plaintiff, the Delta and Pine Land Company, and its subsidiary corporations, and it cannot claim the benefit of the policy, and at the same time set up its own default to defeat the rights of the defendant under the contract so made. The plea of the defendant that notice within the fifteen months after the termination of the policy was a valid defense under the laws of Tennessee, and the facts developed on the trial do not constitute a defense or answer to this plea.

It is clear that the contract was a Tennessee contract, and all the facts developed in the record show that the judgment should have been for the defendant, instead of for the plaintiff. In other words, the Circuit Judge should have decided the case for the defendant instead of for the plaintiff, on the facts developed before it; and the judgment will be reversed, and judgment rendered here for the defendant, the Hartford Accident & Indemnity Company.

Reversed and rendered.

Endorsed on Back: 33,674. Hartford Accident & Indemnity Company v. Delta & Pine Land Company.

Filed 5/8/39. Tom Q. Ellis, Clerk. 14074.

APPENDIX C.

IN THE SUPREME COURT OF MISSISSIPPI

No. 33,674.

HARTFORD ACCIDENT & INDEMNITY CO.

v.

DELTA & PINE LAND COMPANY.

14402a.

In Banc

McGEHEE, *J.:*

This case was first argued orally before, and submitted to, Division B of the Court for decision, and the judgment of the court below in favor of the appellee was reversed and the cause dismissed. On suggestion of error, a request was made of counsel to file additional briefs on the question of whether or not a clause contained in the fidelity bond sued on, requiring any claim thereunder to be made within fifteen (15) months after the termination of the suretyship for the defaulting employe, was a condition precedent to liability. This point had been raised in the *fourth* replication filed in the trial court, by the appellee to the plea of the appellant, and that court had held that the right of action could not be debated, "unless there is some forfeiture in the bond, or there is some stipulation that there will be no liability." In the opinion rendered by Division B as aforesaid, as reported in 188 So. 539, it was said that *three* replications to the appellant's plea had been filed in the trial court. The substance of the first three replications was then set forth in the opinion, and it was held that the demurrers thereto should have been sustained. These three replications merely set forth anew, and also urged additional grounds for, the contention theretofore made by the appellee on a former appeal of the case to this Court, as reported in 169 Miss. 196, 150 So. 205; and to the Supreme Court of the United States, 292 U. S. 143, 78 L. Ed. 1178, to the effect that the rights of the parties under

the fidelity bond sued on were governed by sections 2294 and 5131 of the Mississippi Code of 1930 and the decisions of our Court, instead of the laws of the State of Tennessee; whereas, the fourth replication raised for the first time the specific issue of whether or not, even under the Tennessee decisions, a compliance with the clause of the fidelity bond, relied on in appellant's plea as a bar to recovery, was made a condition precedent to liability, as will be hereafter shown. In the opinion rendered by Division B on the present appeal, in 188 So. 539, supra, no reference was made to this fourth replication, nor was the point involved therein specifically discussed or decided, on account of the fact that the briefs of counsel were largely devoted to reargument of the questions again raised by the first three replications, which had been settled adversely to the appellee's contention by the decision of the United States Supreme Court, 292 U. S. 143, 78 L. Ed. 1178, supra, reversing the decision of this Court on the former appeal, as rendered in 169 Miss. 193, 150 So. 205, supra Upon consideration of the suggestion of error and briefs thereon, the opinion rendered by Division B, as aforesaid, was withdrawn, the judgment of reversal set aside, the cause remanded to the docket for argument before Division A, and thereafter submitted for decision by the Court in banc.

The appellant Indemnity Company contends that the appellee was precluded by the law of the case from raising the issue presented by its fourth replication to the appellant's plea, after the remand of the case to the Circuit Court of Bolivar County for further proceedings not inconsistent with the opinion rendered by the Supreme Court of the United States aforesaid; also, that under the laws of Tennessee its plea is good, and was sustained by the proof. To determine these two questions it is necessary to first state the issue involved on the former appeal here, and the Federal question presented to the Supreme Court of the United States when it reversed the former decision of this Court; and second, to review the decisions of the Tennessee Court and the law as stated by the text writers on the question of whether or not a non-compliance

with the provision of the fidelity bond relied on as a defense to the suit is a condition precedent to liability, or whether a failure to comply therewith merely serves to postpone the right to sue.

On the former appeal the appellee had recovered a judgment against the appellant Indemnity Company for the sum of $2,703.79 because of the alleged default of H. H. Harris, who was listed in a fidelity bond as the treasurer of the appellee, employed in its office at Memphis, Tennessee, and whose honesty and fidelity was insured to the extent of any defalcations, committed in any position, anywhere, not exceeding the sum of $25,000.00, and which bond was entered into and consummated in the State of Tennessee, where the appellee then had its principal office, and where the appellant Indemnity Company maintained a local office.

The declaration alleged that subsequent to the execution and delivery of the contract of indemnity at Memphis, the appellee moved its office to Scott, Mississippi, where the defalcations of Harris occurred on various dates between May 9, 1929, and September 20, 1929, all in Bolivar County, Mississippi, where the appellee was then engaged in conducting a large planting operation as its principal business. That these defalcations were not discovered in the exercise of due diligence until May 24, 1931, when notice was given immediately to the appellant. That within three months thereafter affirmative proof of the loss was filed with the appellant at its home office at Hartford, Connecticut; and the suit was filed within twelve (12) months of the filing of the proof of loss, as required by the policy.

The contract of indemnity was terminated on December 31, 1929, and the appellee had not made its claim until June 22, 1931, which was more than fifteen months after the termination of the contract of suretyship, but within thirty (30) days of the discovery of the shortage, according to the allegations of the declaration.

The appellant filed a plea to the declaration, to the effect that the cause of action could not be maintained for the reason that the contract contained the additional clause which provides that, "Any claim must be duly made upon

the surety within fifteen (15) months after the termination of the contract of suretyship for the defaulting employee, * * *." And the plea averred that plaintiff did not make claim for its loss within the time above required. That, wherefore, the plaintiff should not have its action against the defendant for the reason that the fidelity bond sued on is a Tennessee contract, and is governed by the laws of that state. That, therefore, full faith and credit must be given thereto in the courts of Mississippi under the requirements of article 14, section 1, article 1, section 10, and section 1 of the Fourteenth Amendment to the Constitution of the United States, since there is no statute in Tennessee which prohibits the limitation aforesaid in such contracts of insurance or indemnity, and averred that the highest court of Tennessee, in the cases of Guthrie *v.* Indemnity Ass'n., 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Co. *v.* Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; City of Bristol *v.* Bostick, 146 Tenn. 205, 240 S. W. 774, and other decisions of that court not cited in the plea, had held that such a limitation was valid and binding.

Instead of replying to this plea by saying that while it is true that the provision in the bond, non-compliance with which the defendant had set up therein as a defense, is valid and binding under the decisions of the Tennessee court, and not prohibited in such contracts by any statute of that state, it did not constitute a condition precedent to liability, since the contract did not so provide, nor provide for a forfeiture in the event of a failure to comply therewith,—the plaintiff saw fit not to then file a replication to the legal conclusion contained in the defendant's plea of the effect of the Tennessee decisions, or to plead the fact, to be disclosed by the evidence, that the contract contained no clause providing for a forfeiture for failure to make claim for the loss within fifteen (15) months after the termination of the contract of suretyship, or clause making the filing of the claim within that time a condition precedent to liability, but demurred to the plea and assigned the following grounds:

"1—The construction and validity of the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15)

months after the termination of the suretyship for the defaulting employee is not determined by the laws of the State of Tennessee but is determined by the laws of the State of Mississippi.

"2—The statute of limitations of the state were the suit is brought is the statute of limitations which governs the time within which actions may be brought, and the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee is in violation of section 2294 of the Mississippi Code of 1930 (section 2491 of Hemingway's 1917 Code of Mississippi), and in violation of the public policy of the State of Mississippi, and the courts of this State are not required to give full faith and credit to said provision under and in accordance with the requirements of article 4, section 1; article 1, section 10 and section 1 of the Fourteenth Amendment of the Constitution of the United States as contended in defendant's said plea."

The Circuit Court of Bolivar County having sustained this demurrer, the defendant Indemnity Company declined to plead further, and the judgment was thereupon rendered against it for the alleged defalcations of the plaintiff's employee, Harris, in the sum hereinbefore mentioned. On the appeal here, as reported in 169 Miss. 196, 150 So. 205, supra, the Court affirmed the judgment of the Circuit Court, on the ground that section 5131 of the Mississippi Code of 1930, defining insurance, rendered the fidelity bond sued on a contract of insurance, and solvable under the laws of this State, though made in Tennessee, since the statute provides that, "All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein;" and, further, that in view of the fact that section 2292 of said Code provides that, "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after," and section 2294 thereof renders null and void any change in this limitation by contract between the parties, the plea constituted no defense to the suit. In so holding

that these statutes rendered the contract solvable under the laws of Mississippi instead of Tennessee, our Court was adhering to its former decisions in that regard, whereby the Court, as observed in the opinion referred to, had committed itself to the proposition that a contract of insurance on an interest in this State, although the contract be made in another State, was to be determined by the laws of our own state; and cited in support thereof the cases of Fidelity Mutual Ins. Co. *v.* Miazza, 93 Miss. 18, 46 So. 817, 136 Am. St. Rep. 534; Stuyvesant Ins. Co. *v.* Smith Motor Sales Co., 135 Miss. 585; 99 So. 575, which so held. Hence, the appellee was entitled to assume on that appeal that the only question presented to the Court here for decision on the declaration, plea, and demurrer was whether these Mississippi statutes and decisions would govern the rights of the parties to the contract of suretyship sued on, or whether they were to be governed by the laws of Tennessee, since the limitation in controversy would be unenforceable under the statutes and decisions of the State of Mississippi, if applicable, without regard to whether or not the limitation constituted a condition precedent to liability under the laws of Tennessee. Neither do the briefs, as officially reported in the case on the former appeal, 169 Miss. 196, supra, show that the contention was made therein that the provision in the bond, requiring any claim thereunder to be duly made upon surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, was a condition precedent to liability under the laws of Tennessee; nor is there a Tennessee case cited in the briefs. The only decisions of that court referred to at all are those listed in the appellant's plea, and they do not sustain the affirmative of that proposition, as will be hereinafter shown. In other words, the sole question presented by the plea and demurrer, and argued in the briefs at that time was the question of whether or not the laws of Mississippi could be integrated into this Tennessee contract. This was the issue presented by the declaration, plea and demurrer, and no other question was properly before the court for decision.

From that decision the case was appealed to the Supreme Court of the United States, and the sole grounds of error assigned were:

"The Supreme Court of Mississippi erred in holding that under section 5131 of the Missippi Code of 1930 the bond or policy of insurance sued upon, made and to be performed in Tennessee, was to have been deemed to have been made in Mississippi and solvable under the laws of Mississippi because upon an interest in Mississippi, and therefore under section 2294, Mississippi Code of 1930, the provision of said bond or policy that claim thereunder must be made upon the surety within fifteen months after termination of the suretyship, valid under the laws of Tennessee, was null and void because in conflict with the limitation on actions upon such contracts prescribed by the laws of Mississippi, in that said statutes in such construction and application were made repugnant to Article XIV, Section 1 and Article IV, Section 1 of the 14th Amendment to the Constitution of the United States.

2. "The Supreme Court of Mississippi erred in holding that the bond or policy sued upon was upon an interest in the state of Mississippi."

The Supreme Court of the United States thereupon reversed the decision of this Court, and remanded the cause for further proceedings not inconsistent with its opinion. Hartford Accident & Indemnity Co. *v.* Delta & Pine Land Co., 292 U. S. 143, 78 L. Ed. 1178. Upon such remand the Supreme Court of this state remanded the case to the Circuit Court of Bolivar County, without any further opinion.

The question at issue before the United States Supreme Court is clearly indicated in the syllabi of the case, as being a federal question only. See 78 L. Ed. 1178, as follows:

"A state may, without violating the due process clause, limit or prohibit the making of certain contracts within its own territory; but cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.

"2. A state may not, in an action based upon a contract lawful where made and operative, enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.

"3. A state may not, without violating the due process clause of the Federal Constitution, apply to an employee's fidelity insurance contract, entered into in another state, its own statute annulling any contractual limitation of the time for giving notice of claim, although the default occurred after the removal of the insured and his defaulting employee to the state in which the action is brought."

Moreover, the jurisdiction of that court was necessarily confined to the federal question presented by the appeal, that is to say, whether the Supreme Court of Mississippi had erred in holding that the Mississippi statutes referred to, instead of the laws of Tennessee, should govern this contract made in Tennessee. Judicial Code, section 237, as amended, 28 U. S. C. A., 344, Simpkins' Federal Practice 3rd Ed., section 953, page 283, Brinkerhoff, etc., Co. *v.* Hill, 281 U. S. 680, 74 L. Ed. 1113. Most assuredly, the issue of whether a provision in a contract of indemnity requiring a claim of loss to be made within a specified time, was a condition precedent to liability could not be deemed a federal question. Having determined that the bond sued on was a Tennessee contract by virtue of having been executed and delivered in that state, and was not changed into a Mississippi contract by virtue of our statutes and decisions because of the fact that the defalcations occurred here where the services of the employee were being rendered, and that therefore the laws of Tennessee should have been applied by the state court in determining the effect of the provision of the contract, the non-compliance with which was set up in the plea of the indemnity company as a defense, it is to be assumed that the Supreme Court of the United States in so holding and in remanding the case for further proceedings had in contemplation that the plaintiff in the trial court would be required to reply to the plea, since its demurrer thereto had been held to be without merit, and that both the trial court and this Court would then be called on for the

first time to construe and apply the laws of Tennessee in deciding whether a compliance with the provision set forth in the plea constitutes a condition precedent to liability.

It is true that this Court on the former appeal, 169 Miss. 196, 150 So. 205, supra, when the appellee therein was relying solely on the issue raised by its demurrer, the grounds of which are hereinbefore fully set forth, erroneously assumed and stated that: "It is to be conceded that under the list of decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation of action;" and that the Supreme Court of the United States, 292 U. S. 143, 78 L. Ed. 1178, supra, seemed to have been thereby caused to make the same assumption, without either court having discussed in their respective opinions the Tennessee decision mentioned in the plea, and where the only issue raised by the plea and demurrer, or argued in the briefs, was the federal question of whether the law of Mississippi or that of Tennessee should govern the rights of the litigants. In other words, the demurrer, as appears from the grounds assigned therein, raised the sole question of whether or not the Tennessee decisions had any application, and did not present the question of the interpretation of the meaning and effect of those decisions. The demurrant was entitled to have determined the question of whether the laws of Tennessee should be applied before being required to argue what effect should be given to the laws of that state when applied. The appellant Indemnity Company recognized that the sole issue presented to the state Court on the former appeal was whether the Mississippi statutes and decisions could be integrated into what, according to its contention, was a Tennessee contract, as shown by its brief on pages 197 and 198 of the reported case on the former appeal.

It was held in the recent case of McGoldrick, Comptroller of the City of New York, *v.* Compagnie Generale Transatlantique, decided by the Supreme Court of the United States on March, 25, 1940, and reported as yet only in the advance sheets of its decisions, that "It is also the settled practice of this court, in the exercise of its appellate juris-

diction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. Blair *v.* Oesterlein Co., 275 U. S. 225; Duignan *v.* United States, 274 U. S. 195, 200." And, in the course of its opinion, the Court further stated: "In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determination only so far as they are erroneous and error is not to be predicted upon their failure to decide questions not presented." The question of whether or not the requirement of the bond in controversy was a condition precedent to liability, under the Tennessee decisions, not having been presented by the demurrer, or argued in the brief on the former appeal, should not be deemed to have been decided by the state Court when it affirmed the judgment of the trial court in sustaining the demurrer; but rather that the Court merely assumed that the proposition was to be conceded in the absence of an argument by the appellee to the contrary—an argument which the appellee was not required to make until after the federal question presented by the demurrer should have been first disposed of adversely to its contention, since a favorable decision in all courts sustaining the demurrer would have rendered immaterial the decisions of the Tennessee Court on the question of whether the provisions of the bond involved was a condition precedent under the laws of that state.

The ultimate decision reached having been adverse to the contention of the appellee on the federal question involved, he was then required for the first time to reply in the trial court to the plea which invoked the limitations of fifteen (15) months within which the claim for loss was to be filed, by pleading as an affirmative defense thereto that the limitation was neither made a condition precedent to liability by the terms of the contract, nor was there a forfeiture provided for in the bond, in event of failure to comply therewith.

The pertinent provisions of the fidelity bond in question are fully set forth in the opinion of this Court on the former appeal, 169 Miss. 196, 150 So. 205, *supra,* reference to which

is here made to avoid the necessity of again reciting the same in detail; and from which it will be observed that the only conditions precedent to liability is that a loss be sustained, that the claim and proof of loss be filed with the home office of the Indemnity Company, and that the suit be filed within twelve months (12) after the making of the claim, and the filing of the proof of loss. These conditions were all duly complied with, and the failure to comply with the condition requiring the *claim* to be made within the fifteen months prescribed, only served to postpone the time for bringing the suit, and did not forfeit the right to recover a loss, provided the claim and proof of loss were submitted before the suit was filed, since a compliance with the latter provision was neither made a condition precedent to liability by the terms of the contract, nor was a forfeiture provided for therein for failure so to do, and one of which provisions must be either expressed or clearly implied from the terms employed, according to the decisions of the Supreme Court of Tennessee, in order to make a failure to comply with such a provision a condition of liability. Continental Fire Ins. Co. *v.* Whitaker, 112 Tenn. 555, 64 L. R. A. 451; Johnson *v.* Scottish Union Ins. Co. (Tenn.) 22 S. W. (2nd) 362; Smith *v.* John Hancock Mutual Life Ins. Co. (Tenn.), 71 S. W. (2nd) 1059; City of Bristol *v.* Bostwick, *et al.*, 146 Tenn. 205, 240 S. W. 779; Guthrie *v.* Conn. Indem. Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Co. *v.* Royal Indem. Co., 140 Tenn. 438, 205 S. W. 128; Blackman *v.* U. S. Casualty Co. (Tenn.), 103 S. W. 784. It is true that these cases hold that such a provision is lagal and valid. However, the question here is not whether it is lawful, but what is its effect under the Tennessee decisions when given validity.

The same rule applies under the Mississippi decisions; Fidelity & Depos. Co. *v.* Merchants & Marine Bank, 169 Miss. 755, 151 So. 373, 164 So. 260; Am. Nat. Ins. Co. *v.* Waters, 133 Miss. 28, 96 So. 739; Employers' Liability Ass. Corp. *v.* Jones Co. Lbr. Co., 111 Miss. 759, 72 So. 152; and under a decision of the Supreme Court of appellant's domicile, Elberton Cotton Mills *v.* Indemnity Ins. Co., 108 Conn. 707, 145 Atl. 33, 62 A. L. R. 926; also, 5 Joyce on Insurance, sections 3282, 3283, and 2nd Ed. 548, 33 C. J. 14, section 661,

14 R. C. L. 1327, section 501, Colley's Briefs on Insurance, 2nd Ed., vol. 7, section 1538 (a).

In the case of Continental Fire Ins. Co. *v.* Whitaker, 112 Tenn. 151, the suit was against a fire insurance company for a fire loss. The policy provided, among other things, that: "If fire occurs the insured shall * * * within sixty days after the fire, unless such time is extended in writing, make proof of loss. * * * No suit or action on this policy for the recovery of any claim shall be sustainable * * * until after a full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire." The Court said: "No forfeiture is provided for in the policy for failure to furnish the proofs of loss within sixty days next after the fire, although there are many other acts referred to therein, for which forfeitures are provided.

"In the present case the proofs of loss were furnished within sixty-nine days after the fire, but not within sixty days. The suit was not brought until the expiration of sixty days from the filing of the proofs of loss, and it was brought within twelve months after the fire."

"The rule laid down in Joyce on Insurance applicable to this state of facts is as follows: 'If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time limit after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose a forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, although he does not furnish proofs within the time designated, provided he does furnish them at some other time prior to commencing the action upon the policy. And this has been held to be true, even though the policy provide that no action can be maintained until after a full compliance with all the requirements thereof.' "

The Whitaker case is directly in point. To the same effect is the case of John *v.* Scottish Union Ins. Co. (Tenn.) 22 S. W. (2nd) 362, decided on December 23, 1929. The other Tennessee cases hereinbefore mentioned either expressly made compliance with the provisions in question

a condition precedent to liability, or provided for a forfeiture on failure to comply with the same. And in the case of Blackman *v.* U. S. Casualty Co. (Tenn.), 103 S. W. 784 (relied on by the Indemnity Company in the case at bar) the policy not only made compliance with the provision in question a condition precedent, but further provided that "failure of the insured to comply with any provision or condition herein shall forfeit all rights to indemnify."

Under all of the Tennessee decisions referred to in any of the briefs of counsel, the failure to comply with similar requirements had not been held to defeat liability unless compliance therewith is made a condition precedent thereto, or unless a forfeiture is provided for.

This rule is recognized in 33 C. J. 14, section 661, where it is stated: "If giving notice and furnishing proofs in such time are made conditions precedent to liability on the part of the company, or if a forfeiture is provided for if they are not given in the time fixed, notice and proofs must be given as and when specified in the policy or no recovery may be had, and additional proofs furnished long after the time required by the policy cannot be considered. The courts, however, are reluctant to construe provisions requiring notice and proofs of loss as in the nature of forfeitures, and, where the serving of notice or proofs within the specified time is not expressly made a condition precedent to recovery, and no forfeiture is provided for in case of default in service, notwithstanding forfeitures are stipulated for in case of breach of other requirements of the policy, the failure to serve notice or proofs merely postpones the time of payment and the time for bringing suit, and, if notice and proofs are subsequently served, insured or the insurance claimant may recover on the policy notwithstanding his delay, provided of course the time for suing on the policy has not expired."

See, also, 14 R. C. L., section 501, page 1327, where it is stated: "On the other hand many courts take the position that the requirements in a standard insurance policy that the insured shall give notice and make proof of loss within a certain time are conditions precedent to

the right to sue, but failure to comply with such requirements within the time stipulated does not avoid the policy or work a forfeiture in the absence of a stipulation in the policy to that effect. Such failure merely postpones the day of payment, *provided notice is given and proof of loss is made within such time as will enable the insured to bring his suit within the time limited by the policy.* Especially is this true under a policy which requires notice to be given within a specified time but does not expressly provide that a failure to give such notice shall invalidate all claims under the policy, or where notice was in good faith given a broker through whom the policy was procured and the insurer suffers no loss through a delay due to the broker's mistake. Though a forfeiture is not involved by failing to furnish proofs within the time stipulated they must be furnished within a reasonable time or no recovery can be had."

In Cooley's Briefs on Insurance, 2nd Ed., Vol. 7, page 5770, it is stated: "The weight of authority, however, seems to support the rule that neither a provision that the loss shall not be payable until after the stipulated proofs have been furnished, nor, the provision that no action shall be maintainable until after such compliance with the policy, will render the furnishing of proofs within the stipulated time a condition precedent. Rather do such provisions, by their phraseology, indicate an intention that the payment of loss shall be merely postponed until the proofs are furnished * * * "It would seem to follow, as a necessary corollary from the doctrine that delay beyond a stipulated time will only postpone the liability of the company or the enforcement of the claim, that it will be sufficient in such cases that the proofs are given before the bringing of the action, " * * *

The case of Continental Fire Ins. Co. *v.* Whitaker (Tenn.) supra, is cited as supporting that text.

In Couch's Ency. of Ins. Law, vol. 7, section 1538 (a) it is said: "Nor will a clause providing for a forfeiture for failure to furnish proofs within a specified time be read into a contract, although the policy, in another place, provides that no action shall be brought until after 'full

compliance by the insured with all of the foregoing requirements.' In fact, when there is no express forfeiture provision in the policy, the failure to make proof in the time required thereby merely postpones the time of bringing the suit."

The three Tennessee cases cited by the Indemnity Company in the case at bar in its plea that the failure to present the claim within fifteen months of the termination of the suretyship for the defaulting employee defeated liability, are: Guthrie *v.* Indemnity Ass'n, 101 Tenn. 643; Phoenix Cotton Oil Co. *v.* Royal Indemnity Co., 140 Tenn. 438; and City of Bristol *v.* Bostwick, 146 Tenn. 205.

In the Guthrie case the contract of insurance provided: "It is expressly understood and agreed that no action shall be maintained nor recovery had for any claim upon or by virtue of this policy after the lapse of one year from the death of said insured, and, if said suit or proceeding for such recovery be not commenced within one year from the date of the death of the insured it shall be deemed a waiver on the part of all parties concerned of all right or claims under or by virtue of this policy, and as conclusive evidence against the validity of such claim, and this policy shall be null and void and of no effect and no person shall be entitled to damages or for the recovery of any money paid thereon."

The contract now before us contains a provision, "No suit, action or proceeding shall be brought by the employer against the surety after the expiration of twelve months after the filing of the proof of loss as above required."

Had this provision not been complied with, the decision in the Guthrie case would preclude a recovery by appellee. But that case has no application here, because the appellee complied with that precedent condition.

In the Phoenix Cotton Oil case, supra, the opinion of the Tennessee Court states: "But it (the contract of insurance) made it a condition precedent of such liability that the former should upon the occurrence of any accident covered by this policy give immediate written notice thereof to the company." Then the opinion further states that, "By its express terms the giving of immediate notice was made a condition precedent to the right of recovery."

In the case of City of Bristol *v.* Bostick, supra, the provisions of the policy are not given. Therefore, these three cases are not in conflict with the other decisions of the Tennessee Court, such as the cases of Continental Insurance Co. *v.* Whitaker, 112 Tenn. 555, and Johnson *v.* Scottish Union Ins. Co., 22 S. W. (2nd) 362, hereinbefore discussed, nor with the views of the text writers and the decisions of other courts, including this Court, as reflected in the cases of Fidelity & Deposit Co. *v.* Merchants & Marine Bank, 169 Miss. 755, 151 So. 373, 154 So. 260; Am. Nat. Ins. Co. *v.* Waters, 133 Miss. 28, 96 So. 739; and Employers' Liability Assur. Corp. *v.* Jones Co. Lbr. Co., 111 Miss. 759, 72 So. 152, hereinbefore cited.

The Supreme Court of the United States having held that the law of Tennessee, and not that of Mississippi, governs the rights of the parties, the appellant takes the position that what was said in the opinion of the Supreme Court of the United States on a point which we think was not raised by the demurrer then before the court, "Is the law of the case and binding upon this Court, right or wrong;" notwithstanding the fact that neither the State Supreme Court nor the United States Supreme Court on the former appeal had occasion to consider other than the Federal question raised by the demurrer as to whether our statutes, sections 2294 and 5131 of the Code of 1930, should be integrated into a contract made in Tennessee, or whether the Tennessee decisions should control. When it was held that the law of Tennessee applies, it follows that it then became the province of the Circuit Court of Bolivar County, Mississippi, and of this Court, to determine what the law of Tennessee is as applied to the contract in question; and that for this purpose the case was remanded for further proceedings.

Finally, the Indemnity Company says that under a very recent case, Mass. Mutual Life Ins. Co. *v.* England, 171 Tenn. 104, the court has held that: "Proofs of claim is a condition precedent to bringing a suit, 33 C. J. 74. And this is true even though it is not expressly provided in the policy that furnishing such proofs is a condition precedent to suit, or that failure to submit proofs shall operate as a

forfeiture of benefits. We observe, however, that the court only held that the right *to bring a suit* is postponed until the proof of loss is furnished whenever such proof is required and is not waived. That case is in line with the other authorities hereinbefore quoted from. But in the case at bar the proofs of loss required by the bond were furnished, before *the suit was filed,* and the suit was filed within twelve months thereafter, as required by the bond sued on. Hence, the question decided in the case last above mentioned is not here involved. There is obviously a vital distinction between a postponement of the right to bring suit and being denied the right to recover at all, because the proofs of loss were filed late.

From the foregoing views, it follows that we are of the opinion that the appellee is not precluded either by the law of the case or the decisions of the Supreme Court of Tennessee from a recovery of the loss sued for, and that the judgment of the court below should be affirmed.

Affirmed.

Endorsed on back: 33,674. Hartford Accident & Indemity Co. v. Delta & Pine Land Company.

Filed 4/29/40. Tom Q. Ellis, Clerk. 14402a.

IN THE SUPREME COURT OF MISSISSIPPI.

No. 33,674.

14402b

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

DELTA & PINE LAND COMPANY

In Banc

ETHRIDGE, *J.*, Dissenting:

The general statement of the case is contained in Hartford Accident & Indemnity Company *v.* Delta & Pine Land Company, 169 Miss. 196, 150 So. 205; 188 So. 538 and in 78 L. Ed. 1178 (292 U. S. 143). The case as originally decided

in these former hearings, except as reported in 188 So. 539, proceeded to hearing on a demurrer challenging a sufficiency of the appellant's plea, setting up that the case was controlled by the Laws of Tennessee, and that under the laws of that state the giving of the notice within the fifteen months was a condition precedent to liability on the policy. A demurrer raised the legal sufficiency of the declaration and the full contest over what law controlled and what the effect of the law of Tennessee was, if it controlled, was presented there for decision. Our Court held that the demurrer to the defendant's plea was good, but based its holding upon the opinion that the Mississippi Law controlled rather than the Tennessee Law. This issue as to which law controlled and the effect in law of the plea in defense of the action was necessarily before the Court for a decision, and the decision was announced in plain terms that if the Tennessee Law controlled, the plea presented a defense. The briefs in the case were addressd largely to the question of which law applied, and it did not dispute the proposition that if the Laws of Tennesse controlled, the plea presented a complete defense. This is clear from the following language used in 169 Miss. 205, in deciding the case:

"It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notices of fifteen months is a limitation of liability and not a limitation of action. The converse is true in Mississippi, and the provision is a limitation of the action in this case; our statute of limitation being for six years. Section 2292, Code 1930; Sovereign Camp, W. O. W., *v.* Miller, 125 Miss. 502, 87 So. 892; Standard Accident Insurance Co. *v.* Broom, 111 Miss. 409, (and other cases). The cases of Berry *v.* Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445, 145 So. 887, and New York Life Ins. Co. *v.* Alexander, 122 Miss. 813, 85 So. 93, 15 A. L. R. 314, are clearly differentiated from the others cited above, and in the case of Berry *v.* Lamar Life Ins. Co., *supra,* it is pointed out that the limitation there under review was a condition precedent to the liability imposed upon th insurance company, and not a limitation upon the time in which the action should be brought."

On the appeal from this Court to the U. S. Supreme Court, the matter was also before that Court for decision upon the sufficiency of the demurrer to answer the plea of the defendant. If the plea presented no defense, and if the Laws of Mississippi and Tennessee lead to the same result, the case should not have been reversed, but the decision should have pointed out that the theory under which the Mississippi Supreme Court proceeded was erroneous but that its judgment was correct because the result would be the same,—applying either law. It was the duty of the Delta & Pine Land Company, on the hearing of the first appeal in the Supreme Court of this State, to point out that the Laws of Tennessee, properly understood, would lead to the same result, and that consequently the judgment of the Court should have been affirmed because it would be immaterial as to what reason the court below in its holding sustained the demurrer to the plea of the defendant. It was also its duty to point this out to the U. S. Supreme Court because a litigant should not be permitted to argue one ground of demurrer without arguing other grounds or reasons at the same time. In other words, it should not protract litigation by presenting one ground on one appeal and reserve other grounds for argument on a second appeal. When the U. S. Supreme Court reversed and remanded the case to this Court for further proceeding, not inconsistent with its opinion, it was then the duty of the Delta & Pine Land Company to present to this Court for decision at that time its present contention that the Laws of Tennessee, if applied, would lead to the same result, but it failed so to do and permitted a remand to the court below without raising this contention, acquiescing up to this time in the contention of the Hartford Accident & Indemnity Company that the Laws of Tennessee, if applied, presented a complete defense to the suit. It, on the remand, again contended that the Mississippi Laws still applied on another theory set forth in its first three replications to the defendant's plea. Its first three replications were filed on October 4, 1934, whereas, the fourth, so called, replication was filed March 23, 1938, during the progress of the trial of the case. This fourth replication is not in fact a legal replication at all, but is a mere legal conclusion filed as a plea, without any facts upon which issue could be properly taken

which would constitute an issue of fact rather than an issue of law. The plea reads, as follows:

"And for another and further replication, leave to file which having been first obtained, plaintiff says that the contract of suretyship herein sued upon did not make it a condition precedent to liability on the part of the defendant that any claim thereunder must be duly made upon the defendant, the surety, within fifteen months after the termination of the suretyship for the defaulting employee, and said contract of suretyship did not provide that the same should be forfeited in the event said claim should not be made upon the defendant, the surety, within said period of time, and therefore plaintiff should not be precluded from having and maintaining said suit herein."

The contract upon which the declaration was founded contained all of the stipulations with reference to the notice to be given of default within fifteen months after the termination of the policy of indemnity or insurance. A legal effect of the contract, of course, was presented for decision in the plea to the declaration, and the demurrer to the plea of the defendant and the fourth so called replication at most could only be given the effect of a demurrer to the plea of the defendant. It presents nothing new. The issue it undertakes to present now was squarely on the face of the record when the demurrer to the plea of the defendant was originally filed and sustained. It seems to me to be an intolerable condition to allow a demurrer to a plea to be dealth with as to the sufficiency of the plea by piecemeal. The whole question presented by the demurrer and the plea should have been presented on the former hearing. Furthermore, I think that the U. S. Supreme Court, in its decision, supra, considered the Laws of Tennessee applied to and controlled the policy stipulations. The Court, in discussing the case, at page 1181 of 78 L. Ed. (page 149 of the official report) said:

"A state may limit or prohibit the making of certain contracts within its own territory. (Hooper *v.* California, 155 U. S. 648, 39 L. E. 297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 565, 566 43 L. Ed. 552, 555, 556, 19 S. Ct. 281; New York L. Ins. Co. *v.*

Cravens, 178 U. S. 389, 398, 399, 44 L. Ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York L. Ins. Co. *v.* Head, 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879: Aetna L. Ins. Co. *v.* Dunken, 266 U. S. 389, 399, 69 L. Ed. 342, 349, 45 S. Ct. 129. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. *v.* Dick, 281 U. S. 397, 407, 408, 74 L. Ed. 926, 933, 934, 50 S. Ct. 338, 74 A. L. R. 701.

"It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. * * *"

It is perfectly clear from this language that the U. S. Supreme Court addressed its mind to the contract and determined that it was controlled by the Laws of Tennessee, that it was lawful in Tennessee; and that the controlling stipulation, with reference to the giving of the notice within fifteen months after the termination of the suretyship

guaranteeing the fidelity of the employee were of substantial importance under the Laws of Tennessee. The parties presented their contention to the Supreme Court of the United States, as it did to the Supreme Court of this State, upon the theory that if the Tennessee Laws controlled, the plea of the defendant presented a complete defense to the action. Therefore the decisions of the U. S. Supreme Court and our court constitutes the law of the case and should be applied regardless of whether it was technically correct or not, because, when the Court has once heard parties in the same cause of action, and solemnly decided the controversy, it should not, without the gravest necessity, change the rule announced in a former decision. It is true that neither the Laws of the United States nor of Mississippi deprive the Court of the power to change its decisions if it is fundamentally wrong and results in great mischief, but it will not ordinarily reexamine what has once been solemnly decided. See Brewer, et al. *v.* Browning, et al., 115 Miss. 358, 76 So. 267, L. R. A. 1918F, 1185, so holding; and suggestion of error overruled in 115 Miss. 358, 70 So. 519, L. R. A. 1918F, 1185, Annotated cases in 1918B, 1013; and Mutual Life Insurance Company of New York v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788. The doctrine of the law of the case is not treated as a limit on the powers of the Court to overrule a former decision in the same case, but that as a matter of practice and policy, it will not ordinarily do so. See Remington *v.* Central Pacific Railroad Company, 198 U. S. 95, 26 Sup. Ct. 577, 49 L. Ed. 959; also, 22 Harvard Law Review 438, 34 L. R. A. 321, annotated cases 1918D, 1013.

I therefore think that the law of the case should be applied and judgment of the court below reversed and dismissed. However, the laws of Tennessee, properly understood, in my opinion, make the failure to give notice under the contract within the stipulated time after the termination of the policy a complete defense to an action brought thereafter; where, as, in the present case, there is no contrary provision in the stipulations of the policy calling for specific provisions or making the specific provision by a contract that failure to give one notice would forfeit, and

a failure to give notice under another provision of the same policy no stipulation of forfeiture was stipulated. The decisions in Guthrie *v.* Indemnity Association, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Company *v.* Royal Indemnity Company, 140 Tenn. 438, 205 S. W. 128; City of Bristol, et al. *v.* Bostwick, et al., 146 Tenn., 205, 240 S. W. 774, hold that such conditions or limitations in such contracts are valid and binding, and the said contract of suretyship contained in the present insurance contract makes the giving of the notice within fifteen months a condition precedent to liability. The policy here involved had its own provision about the time within which suit should be brought after notice was given; and that, of course, is a contract limitation on the time in which suit may be brought. The provision for giving the notice of the default within fifteen months from the termination of the employment, the fidelity of which was insured by the contract, is a contract limitation on liability, and is founded in good reason, and is lawful in Tennessee. It is stated in the case of Mass. Mutual Life Insurance Company *v.* England, 171 Tenn. 104, decided in 1937, that the furnishing of such information is a condition precedent to liability. The object and purpose of the two provisions in the present contract are different, and were embraced in the policy for different purposes. The object of the giving of the notice of the default within fifteen months of termination of the insurance contract was to enable the insurance company to have the opportunity to make an investigation while the facts were obtainable and to take appropriate action to protect its interest, and to recover from the employee insured, if possible, the amount it would lose by its fidelity policy. It is said in the case of Mass. Mut. Life Ins. Company *v.* England, supra:

" 'The object of the notice is to acquaint the company with the occurrence of the loss, so that it may make proper investigation and take such action as may be necessary to protect its interests'. 33 C. J., 16.

" 'The object of the proofs is to furnish the company with the particulars of the loss and all data necessary to determine its liability and the amount thereof.' 33 C. J., 17.

"With hundreds of claims coming in daily, a large insurance company would have a considerable portion of its income expended in court costs and attorney's fees if a claimant could institute suit against it without giving it an opportunity to investigate and determine its liability, and the parties have contracted that the insurer shall have such privilege before suit is begun."

The apparent conflict in the decisions of the Supreme Court of Tennessee is due to the difference in verbiage of contracts. In some of the cases, a contract of insurance specifically declared a forfeiture and non-liability if proof was not furnished within the time specified in such provision; while in other conditions in the same policy, there was no such stipulation of forfeiture for non-compliance. Of course, where a policy contains such provisions with different verbiage, it would be held, as was held in Tennessee, that, stipulating forfeiture in a particular provision while not stipulating forfeiture in a similar provision or condition, is was not the intention of the parties to forfeit for non-compliance in conditions where no provision for forfeiture was contained in the policy. The Court also said, in the case of Mas. Mut. Life Ins. Company *v.* England, supra, that the furnishing of such proof is a condition precedent. In some of them a condition precedent to bringing suit, in others a condition precedent to liability. When the language of the contract here involved is set down, it is manifest that it was the intention of the policy to require the notice of the default within the period stipulated, as a condition precedent to liability, and not as a condition for bringing suit. The purpose of such a provision plainly is that the insurance company may have an opportunity to investigate promptly the facts while they are obtainable and while witnesses are available. It is a reasonable stipulation,—conducive to fair dealing—and is not prohibited by any Statute of Tennessee.

I do not deem it necessary to take up and analyze the various cases cited in the majority opinion, for, in my opinion, when all of them are examined, and the facts distinguished, all are consistent with the theory that the stipulation for giving notice was a condition precedent to liability. In the

case at bar, the facts could have easily been discovered had the books and records of the Delta & Pine Land Company been audited and the vouchers examined in the offices of the company, and at the bank where its deposits were made. I think, therefore, that judgment should be reversed and the suit dismissed.

As said in the headnote of the case of Berry *v.* Lamar Life Ins. Company, supra, the "Court will enforce insurance contracts according to their terms, if not prohibited by law or public policy." In the opinion, the Court said: "The life insurance business has become one of the most extensive businesses in the country, and such business depends almost entirely upon contracts. The power to make such contracts as the parties desire to make, when not prohibited by law or public policy, is a fundamental principle of the life insurance business, and is essential to its successful conduct." Of course, the same can be said of all kinds of insurance contracts. The State, under its police power, has extensive authority to regulate insurance and insurance contracts and may prohibit certain types of stipulations in policy contracts, but where there is no prohibition, the parties are free to make their own contracts. The liberty of contract is one of the most important and most essential of all the rights of citizenship. Under the law, as it now exists, corporations have the right to make contracts when not prohibited by law; and, the courts are bound by the contract of the parties where the law has not prohibited or regulated them so as to destroy or mitigate certain types of contracts. The courts must enforce the law as they find it and not as the exigiencies of particular cases may seem to make desirable from any standpoint of personal conceptions of justice. Courts are not lawmakers and have no right to invade the rights of the citizenship except as authorized by law.

Endorsed on back: 33,674. Hartford Accident & Indemnity Company *v.* Delta & Pine Land Company.

Filed 4/29/40. Tom Q. Ellis, Clerk. 14402b.

(8694)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY,
AND ÆTNA CASUALTY & SURETY COMPANY,
Appellants,

vs.

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

WM. M. HALL,
Counsel for Appellants.

INDEX.

Subject Index.

	Page
Motion not under Rules 12 and 7, paragraphs 3, not to be heard in advance of ruling upon jurisdiction	1
Jurisdiction upon ground of second appeal not seriously questioned	1
Motion to affirm not upon grounds contemplated by Rule 7, paragraph 4	2
Motion to affirm upon ground this Court had no jurisdiction in first appeal to construe contract	2
Construction of contract part of Federal question upon which jurisdiction taken	2
Appellee had right on remand to traverse facts pleaded or reply facts in confession and avoidance	3
Appellee in fourth replication set up not facts, merely contention for different construction	3
Matters put in issue by traverse proved or taken judicial notice of	6
Conclusion	7

Table of Cases Cited.

Chawn v. *Taylor*, 116 U. S. 567, 29 L. Ed. 727	4
Clark v. *San Francisco*, 124 U. S., 639, 31 L. Ed. 553	3
Citizens Savings Bank v. *Owensboro*, 173 U. S. 636, 43 L. Ed. 840	3
Douglas v. *Kentucky*, 168 U. S. 488, 42 L. Ed. 553	3
Finney v. *Guy*, 189 U. S. 335, 47 L. Ed. 839	6
Georgia Power Co. v. *Decatur*, 281 U. S. 505, 74 L. Ed. 999	3
Indiana v. *Brand*, 303 U. S. 95, 82 L. Ed. 685	3
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 72 L. Ed. 801	3
Perkins v. *Guy*, 55 Miss. 153	6

Page

STATUTE CITED.

Mississippi Code 1930, Section 1598 ..... 6, 7

COURT RULES CITED.

U. S. Supreme Court Rules:
Rule 7, paragraph 3 1
Rule 7, paragraph 4 2
Rule 12, paragraph 3 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY, AND ÆTNA CASUALTY & SURETY COMPANY,

Appellants,

vs.

DELTA & PINE LAND COMPANY.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Motion to Dismiss.

Appellee's motion to dismiss was not served upon appellant within fifteen days after appellee was served with a copy of petition for and order allowing appeal, with copy of the assignment of errors and statement of jurisdiction, as required by Rule 12, Paragraph 3, and is not, therefore, to be received in advance of the court's ruling upon the jurisdictional statement. Rule 7, Paragraph 3.

Appellants were served with the motion to dismiss August 9th, 1940 and the appeal was allowed and appellee was served May 22nd, 1940.

Motion to Affirm.

Appellee does not seriously question this Court's jurisdiction of the case upon this second appeal. Its motion is really one to affirm.

Appellee moves to affirm, not upon the ground that the appeal was taken for delay only or that the question upon which the decision of the cause depends are so unsubstantial as not to need further argument, as contemplated by Rule 7, Paragraph 4, but upon the ground that there is "no Federal question herein presented not thoroughly settled", by which it means, judging from the argument advanced in support of the motion, that this Court should not consider that the Mississippi Court did not comply with its opinion and mandate in approving with its judgment affirming the Trial Court's placing upon the contract provision in question, a construction obviously different from that which this Court put upon it, on the ground that the Federal question, upon which it took jurisdiction, did not involve a construction of that provision and this Court went beyond its province in construing it as it did.

Appellee states broadly upon page 20 of its brief, that there was naught to be considered upon that appeal but deprivation without due process.

The question upon which this Court took jurisdiction has but to be stated for appellee's error to be apparent.

The question was whether the principal appellant had a right in that provision, under the laws of Tennessee, which it was deprived of without due process.

Whether appellant had such a right in that provision was manifestly as much a part of that question as was the question whether there was deprivation without due process.

This Court has held many times that where the Federal question is whether the obligation of a contract is impaired or there is deprivation of a right under a contract without

due process, the existence of the contract or the right claimed thereunder is part of the Federal question; and that this Court construes the contract to so determine.

Clark v. *San Francisco,* 124 U. S. 639, 31 L. Ed. 553;
Douglas v. *Kentucky,* 168 U. S. 488, 42 L. Ed. 553;
Citizens Savings Bank v. *Owensboro,* 173 U. S. 636, 43 L. Ed. 840;
King Mfg. Co. v. *Augusta,* 277 U. S. 100, 72 L. Ed. 801;
Georgia Power Co. v. *Decatur,* 281 U. S. 505, 74 L. Ed. 999;
Indiana ex rel. Anderson v. *Brand,* 303 U. S. 95, 82 L. Ed. 685.

To determine in this case whether appellant had the right claimed, this Court necessarily had to construe that provision and determine whether it was a condition precedent to liability under the laws of Tennessee, for if it was not such a condition, appellant had no substantial right to be protected in.

The Mississippi Supreme Court evidently recognized that since it expressly conceded in proceeding to the judgment from which the first appeal was taken, that it was a condition to liability under the Laws of Tennessee.

That this Court construed the provision as a condition precedent to liability under the Tennessee law, is apparent from the plain language of its opinion. Appellee confesses this in its attempt to avoid in the way stated.

Of course, this Court's opinion and mandate did not deprive appellee of the right to traverse the *facts* set up in the plea upon which this Court in part predicated its determination, or of the right to set up by replication to the plea, if the Trial Court gave it leave so do to, *facts* by way of confession and avoidance.

Appellee's contention is that the matters set up in its fourth replication were within that right. It admits, just

as the Mississippi Supreme Court did, that the matters set up in its three other replications were matters which were concluded by this Court's decision.

Appellee's fourth replication was, "plaintiff says that the contract and suretyship herein sued upon did not make it a condition precedent to liability on the part of the defendant and any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after termination of the suretyship for the defaulting employee, and said contract of suretyship did not provide that the same should be forfeited in event said claim should not be made upon the defendant, the surety, within said period of time and therefore plaintiff should not be precluded from having and maintaining said suit herein."

From that it is seen that appellee set up in that replication not facts to avoid, but a construction of the provision in question, different from that put upon it by the Court.

This Court had the contract before it, as appellee had exhibited it with and made it part of its declaration and knew that there were no terms in the contract expressly making that provision a condition precedent to liability and none that noncompliance would forfeit appellee's rights under the contract and the Court, therefore, is presumed to have considered those matters when it determined that the provision was a condition precedent to liability under the laws of Tennessee.

Appellee, in that replication, did what this Court held in *Chaffin* v. *Taylor*, 116 U. S. 567, 29 L. Ed. 727, was not permissible after this Court's decision and remand for further proceedings.

Appellee calls attention to the fact that appellant did not demur to this replication as it did to the other three on the ground that the question therein attempted to be raised had been settled by this Court contrary to the law of the case, but it will be apparent to the Court when it comes to review

the record that appellant, by demurring would simply have wasted time in view of the fate of its demurrers to the other replications in the trial court. Appellant, of course, by taking issue upon this replication did not admit that appellee was right in its legal view of this provision; in other words, did not admit that appellee's legal construction of the provision was correct and this Court's legal construction of the provision was wrong and not the law of the case.

The fact that appellee did not contend under its demurrer to the plea when the case was first before the Mississippi Supreme Court, that the provision in question was not a condition precedent to liability under the laws of Tennessee, could not give appellee, as it seems to suggest, the right to have the Trial Court rehear and overrule the decision of this Court, on the belated argument that the provision was to be construed as not a condition precedent because it was not expressly declared so to be or did not provide that noncompliance would forfeit appellee's rights under the contract. Appellee's not making that contention, but standing solely upon that provision's being governed by Mississippi law, could only constitute a waiver of that contention or a concession that appellant's claim with respect to the character of that provision, as set up in its plea in bar of the action, was correct. It would, therefore, be a reason why the question was closed rather than that it was open to further consideration.

Appellee contends that it put the Tennessee law in issue as a fact when, after the remand, the case appeared in the trial court; and that appellant did not upon the trial prove the Tennessee law.

It is conceded that appellee filed a general traverse of appellant's plea after having filed its fourth replication. This traverse was filed just as the trial was entered upon.

The allegations in the plea with respect to the law of Tennessee, were that there was no statute in Tennessee that

prohibited and rendered invalid the provision in question; and that the Supreme Court of Tennessee had held and announced in certain cases named therein and other cases, as the law in Tennessee, that such condition or limitation in such a contract was valid and binding.

This Court thus had before it certain named Tennessee cases for its consideration in determining the character and validity of the provision in question.

It is the rule that Courts do not take as admitted by demurrers the legal effect ascribed to Court decisions referred to in pleadings, but determine for themselves what that effect is, just as they determine the meaning of contracts when their effect is in controversy. *Finney* v. *Guy,* 189 U. S. 335, 343, 47 L. Ed. 839, 844.

It is presumed, therefore, that this Court determined the validity and character of the provision in question in the absence of a statute in Tennessee upon the subject, in the light of its own interpretation of the named Tennessee cases.

It is conceded that after the traverse of the plea it was perhaps necessary for appellant to show that there was no statute in Tennessee prohibiting and rendering invalid such provisions in such contracts. It is stated in appellant's statement of the case in their statement of Jurisdiction and is not denied by appellee in its brief and it will be seen in the record, that it was stipulated between counsel upon the trial that there was no statute in Tennessee prohibiting and rendering invalid such provisions in such contracts.

The traverse put in issue the existence, but not, of course, the legal effect of the Tennessee cases named in the plea. Actual proof, however, did not have to be made of them because the Mississippi Courts take notice of the laws of other States as they do the laws of Mississippi. *Perkins* v. *Guy,* 55 Miss. 153, 177-178; Miss. Code 1930, Section 1598.

Section 1598 reads as follows:

> "Court to take notice of law of United States, other states and territories—When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state."

It is evident from the discussion of the named Tennessee cases and other Tennessee cases in its opinion in this case that the Mississippi Supreme Court took notice of the Tennessee cases under that rule.

In view of the Mississippi law it was possibly not necessary to stipulate with respect to the absence of a statute in Tennessee upon the subject of such provisions, but for fear that it might be considered that the rule did not apply where the allegation was that there was no statute, the stipulation was made to eliminate any question about it.

It is, therefore, respectfully submitted that the Federal question upon which this Court took jurisdiction involved the construction of the provision in question and that the Mississippi Supreme Court disregarded this Court's construction of that provision and appellee's motion to affirm as well as its motion to dismiss should be denied and the case should be heard upon its merits upon the record.

WM. M. HALL,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY ET AL.,

Appellants,

vs.

DELTA & PINE LAND COMPANY,

Appellee.

STATEMENT OF APPELLEE OBJECTING TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

MARCELLUS GREEN,
Jackson, Mississippi;
WALTER SILLERS,
Rosedale, Mississippi;
W. C. ROBERTS,
Rosedale, Mississippi;
OSCAR JOHNSTON,
Scott, Mississippi;
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Jackson, Mississippi,
Attorneys for Appellee.

INDEX.

Subject Index.

	Page
Statement of appellee objecting to jurisdiction and motion to dismiss or affirm	1
Claim of jurisdiction	3
Statement of case as made by this Court and the Supreme Court of Mississippi	4
Brief in support of objection to jurisdiction and motion to dismiss or affirm	3
Summary of the argument	16
Point I: Unto appellant's assignment (1) the Supreme Court of Mississippi did not proceed consistently with the opinion and mandate in this cause, we answer	19
Point II: Appellant's second assignment is: "The Supreme Court of Mississippi was in error in holding that under the Tennessee decisions the provision of the bond that any claim thereunder must be made upon the surety within fifteen months after termination of its suretyship for the defaulting employee, was not a condition precedent, compliance with which was essential to a recovery upon the bond"	31

Table of Cases Cited.

Allen v. *Alleghany Co.*, 196 U. S. 458, 49 L. Ed. 551	25
Brewer v. *Browning*, 115 Miss. 358, 76 So. 519	23
Campbell-Moss-Johnson v. *Lupton*, — Tenn. —, 290 S. W. 992, 51 A. L. R. 374, note 384, 390	30
Canal Commercial Tr. & Sv. Bank v. *Brewer*, 273 U. S. 638, 71 L. Ed. 816	31
Central Trust Co. v. *Meridian Light & Railway Co.*, 64 So. 216, 46 So. 415	23
Chaffin v. *Taylor*, 116 U. S. 567, 29 L. Ed. 727	17, 19, 26
Compton v. *Compton*, 196 So. (Miss.), 635	19
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 78, 82 L. Ed. 1188, 1194	24
Finney v. *Guy*, 189 U. S. 35, 47 L. Ed. 839	31
Georgia Railway & Elec. Co. v. *Decatur*, 297 U. S. 620, 80 L. Ed. 925	18, 19

Page

Georgia Ry. etc. Co. v. *City of Decatur*, 297 U. S. 620, 80 L. Ed. 926 27
Glenn v. *Garth*, 147 U. S. 360 ..... 18, 28, 31
Hanley v. *Donohue*, 116 U. S. 7, 27 L. Ed. 536 20
Hartford Accident & Ind. Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928 4
In re: Blake, 175 U. S. 114, 44 L. Ed. 94 ..... 18, 24
Johnson v. *New York Life Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273 26
Middlesex Banking Co. v. *Field*, 84 Miss. 666 22
Osborn v. *Ozlin*, — U. S. —, 84 L. Ed. 709 ..... 20, 24, 30
Pennsylvania Fire Ins. Co. v. *Gold Issue Mining, etc., Co.*, 243 U. S. 95, 61 L. Ed. 616 23
Pritchard v. *Norton*, 106 U. S. 124, 136, 27 L. Ed. 104, 108 31
Smithsonian Institution v. *St. John*, 214 U. S. 19, 53 L. Ed. 892 ..... 26, 31
Southwestern Bell Tel. Co. v. *Oklahoma*, 303 U. S. 212, 82 L. Ed. 755 28
Sperry's Estate v. *Sperry*, 196 So. 656 ..... 17, 23
State v. *L. & N. Railroad*, 97 Miss. 35, 51 So. 918, 104 Miss. 413, 61 So. 425, 107 Miss. 507, 65 So. 881 23
Swift v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 24

STATUTES CITED.

Section 237, Judicial Code, as amended (Revised Statutes, Section 690-709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Section 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 937), 28 U. S. C. A., Section 344 3
Section 237 Judicial Code, as amended, 28 U. S. C. A., 344 ..... 19, 31
Note, 74 A. L. R. 716 23
Mississippi Code, Sections 2294 and 5131 24
11 Am. Juris, 405 31
2 Beale, Conflict of Laws, 1165, Sec. 332.49 31
Section 237, Judicial Code, as amended, 28 U. S. C. A., Section 344 31
Appendix "A" 33

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY ET AL.,

Appellants,

vs.

DELTA & PINE LAND COMPANY,

Appellee.

STATEMENT OF APPELLEE OBJECTING TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Comes Delta & Pine Land Company, a corporation, called appellee, objects to jurisdiction being taken, moves to dismiss, but if technically jurisdiction has attached, then that the cause be affirmed, there being no Federal question herein presented not thoroughly settled.

Respectfully,

MARCELLUS GREEN,
Jackson, Mississippi;
WALTER SILLERS,
Rosedale, Mississippi;
W. C. ROBERTS,
Rosedale, Mississippi;
OSCAR JOHNSTON,
Scott, Mississippi;
GARNER W. GREEN,
Jackson, Mississippi,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY ET AL.,

Appellants,

vs.

DELTA & PINE LAND COMPANY.

BRIEF IN SUPPORT OF OBJECTION TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Claim of Jurisdiction.

Appellant claims jurisdiction under Section 237, Judicial Code, as amended (Revised Statutes, Section 690-709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Section 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 937), 28 U. S. C. A., Section 344, in that—

(a) Upon remand, Mississippi's court did not conform to the opinion and mandate of this Court; and

(b) (Assigned, but not argued in the jurisdictional statement) "The Supreme Court of Mississippi was in error in holding that under the Tennessee decisions the provision of the bond that any claim thereunder must be made upon the surety within fifteen months after termination of its suretyship for the defaulting employee, was not a condition

precedent, compliance with which was essential to a recovery upon the bond."

Statement of Case as Made by This Court and the Supreme Court of Mississippi.

On prior appeal (*Hartford Accident & Ind. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928), reversing Mississippi's court on the former appeal, as reported in 169 Miss. 196, 150 So. 205, this Court stated this case at that time:

> "This was an action instituted in a circuit court of Mississippi by Delta & Pine Land Company, a corporation of that state, with its principal place of business therein, against Hartford Accident & Indemnity Company, a corporation of Connecticut, having its principal place of business in Hartford in that state. The declaration alleges that on or about January 1, 1928, the plaintiff applied to the defendant for a fidelity bond and paid the agreed premiums therefor, and the defendant executed and delivered to the plaintiff such a bond, whereby it bound itself to pay the plaintiff, within sixty days after satisfactory proof, pecuniary loss sustained by the plaintiff through fraud or dishonesty or wilful misapplication by any employee 'in any position, anywhere,' from the time that the name of such employee should be placed upon a schedule attached to the bond to and including the termination of the suretyship for such employee by his dismissal, retirement from service, discovery of loss, or cancellation of the bond by the parties. It is alleged that the name of H. H. Harris, as treasurer of the plaintiff, appears upon the schedule, and that the amount of coverage for him is $25,000. Sundry defalcations by Harris between May 9, 1929, and December 20, 1929, totaling $2703.79, are set forth, all of which and the resulting loss occurred in the first judicial district of Bolivar County, Mississippi. The further material matters charged are that the defendant through-

out all the times mentioned in the declaration, and ever since, was and now is duly qualified and licensed to do business in Mississippi; that the dishonest acts of Harris were discovered on or about May 20, 1931, immediate notice given to the defendant at its home office, and affirmative proof of loss under oath, with full particulars, filed with the defendant at its home office within three months after the discovery. The declaration in conclusion asserts compliance by plaintiff with all the terms of the bond, and refusal of the defendant, though requested, to make payment of the sum demanded. Annexed to the declaration are copies of the bond and the supplementary schedules forming part of it.

"The defendant's plea was, in substance: The plaintiff, before and at the date of the contract of suretyship, was doing business in Tennessee, with its principal office at Memphis in that state, and defendant also was then and is now doing business in Tennessee, having an agency at Memphis; plaintiff, through its office at Memphis, applied to defendant through its agency there for the bond, rider and schedules containing the name of the defaulting employee, Harris, constituting the contract of suretyship; defendant through its agency at Memphis executed and delivered the bond and schedules to plaintiff at its office in that city; the contract is a Tennessee contract and governed by the laws of Tennessee, and full faith and credit must be given to it in the courts of Mississippi in accordance with the requirements of Article 4, Section 1, Article 1, Section 10, and Section 1 of the 14th Amendment of the Constitution of the United States; there was not at the time of delivery of the contract, and is not now, any statute in Tennessee prohibiting or invalidating the condition or limitation in the contract to the effect that any claim thereunder must be duly made upon the defendant as surety within fifteen months after the termination of the suretyship for the defaulting employee, and the plaintiff did not make claim upon the defendant for the loss within fifteen months after the

termination of the suretyship for Harris, as the contract was cancelled and terminated December 31, 1929, and the plaintiff made no claim until June 22, 1931.

"To this plea the plaintiff demurred, assigning these causes of demurrer: (1) the construction and validity of the provision of the contract relied upon in the plea is to be determined by the laws of Mississippi, and not by the laws of Tennessee; (2) the statute of limitations of the state where suit is brought is the statute which governs the time for bringing this action, and the provision in the contract requiring that any claim thereunder must be made upon the defendant within fifteen months after the determination of the suretyship for the defaulting employee is in violation of Section 2294 of the Mississippi Code of 1930, and in violation of the public policy of Mississippi, and its courts are not required to give full faith and credit to this provision of the contract by Article 4, Section 1, Article 1, Section 10, or Section 1 of the 14th Amendment of the Constitution.

"The cause came on for hearing upon the pleadings, and the court sustained the demurrer. The defendant declined to plead further; whereupon judgment was entered by default in favor of the plaintiff, a jury was impaneled and assessed damages at the amount claimed, and final judgment was accordingly entered.

"Upon appeal by the defendant the Supreme Court of Mississippi affirmed the judgment. Conceding that under the decisions of the Supreme Court of Tennessee the provision for notice within fifteen months of the termination of the suretyship is a valid limitation of liability and not a limitation of action, the court said the converse is true in Mississippi. Although the bond was executed and delivered and the agreement consummated in Tennessee, where the plaintiff and the defendant's agent had their respective offices, and where, in the absence of proof of a contrary intent, the contract was to be performed, the court concluded that the statutes of Mississippi made the instrument a Mississippi contract, and annulled the contractual limitation of the time for giving of notice of claim.

"The Mississippi statutes relied upon were the following:

" 'A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an indemnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein.' Miss. Code 1930, Section 5131.

" 'The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants.' Miss. Code 1930, Section 2294.

"The state Supreme Court said:

" 'But clearly under Section 5131, Code 1930, defining insurance, this indemnity bond is a contract of insurance within the purview of that statute; and, further, it being expressly provided therein that all contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein, in our judgment, makes the contract herein under review a Mississippi contract and solvable under the laws of this state. The contract here provided or stipulated that the appellee should be indemnified from loss by the defalcation of H. H. Harris in any position anywhere, and when he, the employee and the insured herein, re-

moved to Mississippi and there defaulted, so far as the appellee is concerned its interest was insured or indemnified by the appellant in Mississippi, and, under the provision quoted from the above statute, became operative, and this state is obligated to enforce it, as a Mississippi contract, although it contained all the elements necessary to make it a Tennessee contract, but for the statute.'

* * * * * * *

"'When the statute declares that such a contract shall be deemed to be made in this state, it means that the conflict of law between the two states is eliminated, and thereby, * * * a contract for fifteen months' notice was a limitation of the action enforceable as such in this state.' (— Miss. —, 150 So. 207.)

"*The Mississippi statutes, so construed, deprive the appellant of due process of law.*" (Italics ours unless noted.)

Whereupon, this Court concluded its opinion thus:

"Our conclusion renders unnecessary a consideration of the claims made under the full faith and credit and contract clauses of the Federal Constitution.

"The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

Upon remand by the State Supreme Court, the Fourth Replication was filed without objection, issue taken by consent, and upon this, the State Supreme Court decided the case upon the present appeal. This Replication set up that under the Tennessee law the provisions of the policy sued on imposed an absolute obligation for payment, that compliance with the provision as to suit within 15 months was not a condition precedent, nor was there a forfeiture declared for non-compliance therewith. Appellee took issue upon appellant's plea as to the Tennessee law embodied in

Tennessee's decisions. An examination of the record will disclose that appellant failed to prove its plea in this and other particulars.

The circuit judge took the same view of the law as did the majority of the Supreme Court on the second hearing, yet Division B, overlooking completely the Fourth Replication, assumed to hold that by sustaining the demurrer, appellee was precluded from taking issue upon the issuable facts averred, but notwithstanding, upon a Suggestion of Error, directing the Court's attention to the Fourth Replication, as to the Tennessee law, the prior judgment was reversed and vacated, and an opinion delivered, 195 So. 667, thus stating the case on the present appeal (Appendix "A" hereto):

> "This case was first argued orally before, and submitted to, Division B of the Court for decision, and the judgment of the court below in favor of the appellee was reversed and the cause dismissed. On suggestion of error, a request was made of counsel to file additional briefs on the question of whether or not a clause contained in the fidelity bond sued on, requiring any claim thereunder to be made within fifteen (15) months after the termination of the suretyship for the defaulting employe, was a condition precedent to liability. This point had been raised in the *fourth* replication filed in the trial court, by the appellee to the plea of the appellant, and that court had held that the right of action could not be defeated 'unless there is some forfeiture in the bond, or there is some stipulation that there will be no liability.' In the opinion rendered by Division B as aforesaid, as reported in 188 So. 539, it was said that *three* replications to the appellant's plea had been filed in the trial court. The substance of the first three replications was then set forth in the opinion, and it was held that the demurrers thereto should have been sustained. These three replications merely set forth anew, and also urged additional grounds for, the contention theretofore made by the appellee on a former

appeal of the case to this Court, as reported in 169 Miss. 196, 150 So. 205; and to the Supreme Court of the United States, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, to the effect that the rights of the parties under the fidelity bond sued on were governed by sections 2294 and 5131 of the Mississippi Code of 1930 and the decisions of our Court, instead of the laws of the State of Tennessee; whereas, the fourth replication raised for the first time the specific issue of whether or not, even under the Tennessee decisions, a compliance with the clause of the fidelity bond, relied on in appellant's plea as a bar to recovery, was made a condition precedent to liability, as will be hereafter shown. In the opinion rendered by Division B on the present appeal, 188 So. 539, supra, no reference was made to this fourth replication, nor was the point involved therein specifically discussed or decided, on account of the fact that the briefs of counsel were largely devoted to reargument of the questions again raised by the first three replications, which had been settled adversely to the appellee's contention by the decision of the United States Supreme Court, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, supra, reversing the decision of this Court on the former appeal, as rendered in 169 Miss. 196, 150 So. 205, supra. Upon consideration of the suggestion of error and briefs thereon, the opinion rendered by Division B, as aforesaid, was withdrawn, the judgment of reversal set aside, the cause remanded to the docket for argument before Division A, and thereafter submitted for decision by the Court in banc.

"The appellant Indemnity Company contends that the appellee was precluded by the law of the case from raising the issue presented by its fourth replication to the appellant's plea, after the remand of the case to the Circuit Court of Bolivar County for further proceedings not inconsistent with the opinion rendered by the Supreme Court of the United States aforesaid; also, that under the laws of Tennessee its plea is good, and was sustained by the proof. To determine these two

questions it is necessary to first state the issue involved on the former appeal here, and the federal question presented to the Supreme Court of the United States when it reversed the former decision of this Court; and second, to review the decisions of the Tennessee Court and the law as stated by the text writers on the question of whether or not a non-compliance with the provision of the fidelity bond relied on as a defense to the suit is a condition precedent to liability, or whether a failure to comply therewith merely serves to postpone the right to sue.

"On the former appeal the appellee had recovered a judgment against the appellant Indemnity Company for the sum of $2,703.79 because of the alleged default of H. H. Harris, who was listed in a fidelity bond as the treasurer of the appellee, employed in its office at Memphis, Tennessee, and whose honesty and fidelity, was insured to the extent of any defalcations, committed in any position, anywhere, not exceeding the sum of $25,000, and which bond was entered into and consummated in the state of Tennessee, where the appellee then had its principal office, and where the appellant Indemnity Company maintained a local office.

"The declaration alleged that subsequent to the execution and delivery of the contract of indemnity at Memphis, the appellee moved its office to Scott, Mississippi, where the defalcations of Harris occurred on various dates between May 9, 1929, and September 20, 1929, all in Bolivar County, Mississippi, where the appellee was then engaged in conducting a large planting operation as its principal business. That these defalcations were not discovered in the exercise of due diligence until May 24, 1931, when notice was given immediately to the appellant. That within three months thereafter affirmative proof of the loss was filed with the appellant at its home office at Hartford, Connecticut; and the suit was filed within twelve (12) months of the filing of the proof of loss, as required by the policy.

"The contract of indemnity was terminated on December 31, 1929, and the appellee had not made its claim

until June 22, 1931, which was more than fifteen months after the termination of the contract of suretyship, but within thirty (30) days of the discovery of the shortage, according to the allegations of the declaration.

"The appellant filed a plea to the declaration, to the effect that the cause of action could not be maintained for the reason that the contract contained the additional clause which provides that, 'Any claim must be duly made upon the surety within fifteen (15) months after the termination of the contract of suretyship for the defaulting employee, * * *.'" And the plea averred that plaintiff did not make claim for its loss within the time above required. That, wherefore, the plaintiff should not have its action against the defendant for the reason that the fidelity bond sued on is a Tennessee contract, and is governed by the laws of that state. That, therefore, full faith and credit must be given thereto in the courts of Mississippi under the requirements of article 4, section 1, article 1, section 10, and section 1 of the Fourteenth Amendment to the Constitution of the United States, since there is no statute in Tennessee which prohibits the limitation aforesaid in such contracts of insurance or indemnity, and averred that the highest court of Tennessee, in the cases of Guthrie *v.* Indemnity Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Co. *v.* Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; City of Bristol *v.* Bostwick, 146 Tenn. 205, 240 S. W. 774, and other decisions of that court not cited in the plea, had held that such a limitation was valid and binding.

"Instead of replying to this plea by saying that while it is true that the provision in the bond, non-compliance with which the defendant had set up therein as a defense, is valid and binding under the decisions of the Tennessee court, and not prohibited in such contracts by any statute of that state, it did not constitute a condition precedent to liability, since the contract did not so provide, nor provide for a forfeiture in the event of a failure to comply therewith—the plaintiff saw fit not to then file a replication to the legal conclusion con-

tained in the defendant's plea of the effect of the Tennessee decisions, or to plead the fact, to be disclosed by the evidence, that the contract contained no clause providing for a forfeiture for failure to make claim for the loss within fifteen (15) months after the termination of the contract of suretyship, or clause making the filing of the claim within that time a condition precedent to liability, but demurred to the plea and assigned the following grounds:

" '1—The construction and validity of the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after the termination of the suretyship for the defaulting employee is not determined by the laws of the state of Tennessee but is determined by the laws of the state of Mississippi.

" '2—The statutes of limitations of the state where the suit is brought is the statute of limitations which governs the time within which actions may be brought, and the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee is in violation of section 2294 of the Mississippi Code of 1930 (section 2491 of Hemingway's 1917 Code of Mississippi), and in violation of the public policy of the state of Mississippi, and the courts of this state are not required to give full faith and credit to said provision under and in accordance with the requirements of article 4, section 1; article 1, section 10 and section 1 of the Fourteenth Amendment of the Constitution of the United States as contended in defendant's said plea.'

"The Circuit Court of Bolivar County having sustained this demurrer, the defendant Indemnity Company declined to plead further, and the judgment was thereupon rendered against it for the alleged defalcations of the plaintiff's employee, Harris, in the sum hereinbefore mentioned. On the appeal here, as re-

ported in 169 Miss. 196, 150 So. 205, supra, the Court affirmed the judgment of the Circuit Court, on the ground that section 5131 of the Mississippi Code of 1930, defining insurance, rendered the fidelity bond sued on a contract of insurance, and solvable under the laws of this state, though made in Tennessee, since the statute provides that, 'All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein;' and, further, that in view of the fact that section 2292 of said Code provides that, 'All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after,' and section 2294 thereof renders null and void any change in this limitation by contract between the parties, the plea constituted no defense to the suit. In so holding that these statutes rendered the contract solvable under the laws of Mississippi instead of Tennessee, our Court was adhering to its former decision in that regard, whereby the Court, as observed in the opinion referred to, had committed itself to the proposition that a contract of insurance on an interest in this state, although the contract be made in another state, was to be determined by the laws of our own state; and cited in support thereof the cases of Fidelity Mutual Ins. Co. *v.* Miazza, 93 Miss. 18, 46 So. 817, 136 Am. St. Rep. 534; Stuyvesant Ins. Co. *v.* Smith Motor Sales Co., 135 Miss. 585, 99 So. 575, which so held. Hence, the appellee was entitled to assume on that appeal that the only question presented to the Court here for decision on the declaration, plea, and demurrer was whether these Mississippi statutes and decisions would govern the rights of the parties to the contract of suretyship sued on, or whether they were to be governed by the laws of Tennessee, since the limitation in controversy would be unenforceable under the statutes and decisions of the state of Mississippi, if applicable, without regard to whether or not the limitation constituted a condition precedent to liability under the laws of Tennessee.

Neither do the briefs, as officially reported in the case on the former appeal, 169 Miss. 196, 150 So. 205, supra, show that the contention was made therein that the provision in the bond, requiring any claim thereunder to be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, was a condition precedent to liability under the laws of Tennessee; nor is there a Tennessee case cited in the briefs. The only decisions of that Court referred to at all are those listed in the appellant's plea, and they do not sustain the affirmative of that proposition, as will be hereinafter shown. In other words, the sole question presented by the plea and demurrer, and argued in the briefs at that time was the question of whether or not the laws of Mississippi could be integrated into this Tennessee contract. This was the issue presented by the declaration, plea and demurrer, and no other question was properly before the Court for decision.

"From that decision the case was appealed to the Supreme Court of the United States, and the sole grounds of error assigned were:

" 'The Supreme Court of Mississippi erred in holding, that under section 5131 of the Mississippi Code of 1930 the bond or policy of insurance sued upon, made and to be performed in Tennessee, was to have been deemed to have been made in Mississippi and solvable under the laws of Mississippi because upon an interest in Mississippi, and therefor under section 2294, Mississippi Code of 1930, the provision of said bond of policy that claim thereunder must be made upon the surety within fifteen months after termination of the suretyship, valid under the Laws of Tennessee, was null and void because in conflict with the limitations on actions upon such contracts prescribed by the laws of Mississippi, in that said statutes in such construction and application were made repugnant to Article IV, Section 1 and Section 1 of the 14th Amendment to the Constitution of the United States.

"'2. The Supreme Court of Mississippi erred in holding that the bond or policy sued upon was upon an interest in the state of Mississippi.'

"The Supreme Court of the United States thereupon reversed the decision of this Court and remanded the cause for further proceedings not inconsistent with its opinion. Hartford Accident & Indemnity Co. *v.* Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928. Upon such remand the Supreme Court of this state remanded the case to the Circuit Court of Bolivar County, without any further opinion."

The Circuit court having found that the Tennessee decisions did not make this provision as to suit within fifteen months a condition precedent to liability, nor declare a forfeiture by reason thereof under the Tennessee decisions, found the law to be for plaintiff and accordingly rendered judgment. Upon appeal, as above shown, the Supreme Court of Mississippi affirmed, whereafter appellant appealed and assigns but two errors:

(1) "The Supreme Court of Mississippi did not proceed consistently with the opinion and mandate of the Supreme Court of the United States in this cause," and

(2) "The Supreme Court of Mississippi was in error in holding that under the Tennessee decisions the provision of the bond that any claim thereunder must be made upon the Surety within fifteen months after termination of its Suretyship for the defaulting employee, was not a condition precedent, compliance with which was essential to a recovery upon the bond."

Summary of the Argument.

Point I: Answering Appellant's Assignment (1), "The Supreme Court of Mississippi did not proceed consistently with the opinion and mandate in this cause, we submit:

(a) Complete and perfect and full compliance therewith had by Mississippi's Court;

(b) Appellant's decisions distinguished and additional reasons given why jurisdiction should be refused.

Appellant cites only three cases:

a. Chaffi v. *Taylor,* 116 U. S. 567, 29 L. Ed. 727, which is distinguishable because—

(1) This Court on the prior appeal considered and adjudged naught but deprivation of due process under the Federal Constitution;

(2) No jurisdiction in this Court upon the prior appeal to consider non-Federal questions;

(3) The questions determined on this appeal by Mississippi's Court as to what was decided on the prior appeal is conclusive here, Mississippi's Court holding that not until the fourth replication was filed (without objection under settled State practice, *Sperry's Estate* v. *Sperry,* 196 So. 656), did it become an issue as to what was the law in Tennessee under the Tennessee decisions and that Mississippi's Court had full jurisdiction to determine as to what that law was;

(4) What the law of Tennessee was as a fact was not in issue until the present appeal;

(5) Here, pursuant to a remand, the State court accepted as binding that correctly determined by this Court on the prior appeal—the fact that Mississippi could not integrate its two code sections into a validly-made Tennessee contract, and thereafter this was conceded by Mississippi's Court, and having so done, Mississippi's Court accepted the applicability of Tennessee's decisions construed those decisions,

and construction, alone, does not import a Federal question.

b. In re: Blake, 175 U. S. 114, 44 L. Ed. 94.

This case is distinguishable upon the same grounds urged *supra,* and where validity of the Tennessee law is conceded—its applicability admitted, but thereof naught but a construction is to be—there being no Tennessee statute involved—no Federal jurisdiction obtains.

c. Georgia Railway & Elec. Co. v. *Decatur,* 297 U. S. 620, 80 L. Ed. 925, which is readily distinguishable upon the same grounds, this Court being jealous of its jurisdiction and "may not be required to determine whether that (state) construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the State Courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated." *Glenn* v. *Garth,* 147 U. S. 360, *infra.*

This contract of insurance could never have become a valid contract in Tennessee.

Point II: Appellant's Second Assignment is: "The Supreme Court of Mississippi was in error in holding that under the Tennessee decisions the provision of the bond that any claim thereunder must be made upon the surety within fifteen months after termination of its suretyship for the defaulting employee, was not a condition precedent, compliance with which was essential to a recovery upon the bond."

Whereto, we answer:

(a) No jurisdiction for the same reasons assigned in Point I;

(b) Where there is mere construction without a challenge of validity no Federal question arises;

(c) No jurisdiction under Section 237 Judicial Code, as amended, 28 U. S. C. A., 344.

Point I.

Unto Appellant's Assignment (1) "The Supreme Court of Mississippi did not proceed consistently with the opinion and mandate in this cause, we answer:

A. Complete and perfect and cheerful compliance therewith was had by Mississippi's Court. Quotation, *supra*, Appendix A.

Georgia Ry. & Elec. Co. v. *Decatur*, 297 U. S. 620, 80 L. Ed. 925.

Compton v. *Compton*, 196 So. (Miss.), 635.

B. Appellant's decisions distinguished and additional reasons given why jurisdiction should be refused.

Appellant cites only three cases:

a. Chaffin v. *Taylor*, 116 U. S. 567, 29 L. Ed. 727, wherein this Court said:

> "The rejoinder of the defendant allowed to be filed after the judgment of reversal, therefore, sought again to draw in question the very matter which had been already finally adjudged by this court in the same case. It did not deny the genuineness of the coupons tendered nor the fact of tender, and the question of law broadly decided on the demurrer to the replication necessarily involved every defense, arising as matter of law, that could be made upon any existing Acts of the General Assembly of Virginia; for the whole law of the case, as to the plaintiff's legal right to recover on his cause of action, was presented by the pleadings and was concluded by the judgment of reversal.

"As was said in Clark *v.* Keith, 106 U. S. 464 (Bk. 27, L. Ed. 302), 'That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be reexamined on a subsequent writ brought in the same suit. This rule was distinctly stated in Supervisors *v.* Kennicott, 94 U. S. 498 (Bk. 24, L. Ed. 260), where numerous authorities are cited, beginning as early as Himely *v.* Rose, 5 Cranch, 313' (9 U. S. bk. 3 L. Ed. 111)."

Upon the prior appeal, appellee stood on its demurrer, admitting the contract to be validly executed in Tennessee (*Osborn* v. *Ozlin,* — U. S. —, 84 L. Ed. 709), and into that Tennessee contract, sought to integrate Mississippi's Code Sections 2294 and 5131, which was permitted by Mississippi's Supreme Court but denied by this Court, and thereasto, we submit:

(1) *This Court on the prior appeal considered and adjudged naught but deprivation of due process under the Federal Constitution.*

In *Hanley* v. *Donohue,* 116 U. S. 7, 27 L. Ed. 536, Syllabus 3, it is held:

"An allegation as to the legal effect of a judgment * * * is admitted by demurrer."

and pursuant to appellee's rights, as adjudged in Appendix "A", appellee stood squarely upon its two Mississippi statutes, which it asserted gave it a right to a judgment and when the cause was heard before, appellee urged naught else to affirm, and properly so, because on that appeal, this Court's jurisdiction was limited to the Federal questions raised.

As said by Mississippi's court, 195 So. 671:

"It was held in the recent case of McGoldrick, Comptroller of the City of New York, *v.* Compagnie Gen-

erale Transatlantique, 60 S. Ct. 670, 672, 84 L. Ed. —, decided by the Supreme Court of the United States on March 25, 1940, that: 'It is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed in the courts below. Blair *v.* Oesterlein Co., 275 U. S. 220, 225, 48 S. Ct. 87, 88, 72 L. Ed. 249; Duignan *v.* United States, 274 U. S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996.' And, in the course of its opinion, the Court further stated: 'In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented.' The question of whether or not the requirement of the bond in controversy was a condition precedent to liability, under the Tennessee decisions, not having been presented by the demurrer, or argued in the briefs on the former appeal, should not be deemed to have been decided by the state Court when it affirmed the judgment of the trial court in sustaining the demurrer; but rather that the Court merely assumed that the proposition was to be conceded in the absence of an argument by the appellee to the contrary—an argument which the appellee was not required to make until after the federal question presented by the demurrer should have been first disposed of adversely to its contention, since a favorable decision in all the courts sustaining the demurrer would have rendered immaterial the decisions of the Tennessee Court on the question of whether the provisions of the bond involved was a condition precedent under the laws of that state.''

(2) *No jurisdiction in this Court upon the prior appeal to consider non-Federal questions.*

Appellee, on the prior appeal, did not seek to advert to Tennessee law, and did not, under Mississippi practice, raise that question in any way (Appendix A), and the jurisdiction of this Court is limited to Federal questions properly presented. Following this Court, Mississippi's court said:

> "Moreover, the jurisdiction of that court was necessarily confined to the federal question presented by the appeal, that is to say, whether the Supreme Court of Mississippi had erred in holding that the Mississippi statutes referred to, instead of the laws of Tennessee, should govern this contract made in Tennessee. Judicial Code, Section 237, as amended, 28 U. S. C. A., Section 344, Simpkins' Federal Practice 3rd Ed., section 953, page 283, Brinkerhoff, etc., Co. *v.* Hill, 281 U. S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, 1113. Most assuredly, the issue of whether a provision in a contract of indemnity requiring a claim of loss to be made within a specified time, was a condition precedent to liability could not be deemed a federal question."

(3) *The questions determined on this appeal by Mississippi's court as to what was decided on the prior appeal is conclusive here.*

Res adjudicata is not a Federal, but a local question, and on the prior appeal, appellee made no question as to the law of Tennessee, which was not (a) presented to, (b) argued before, or (c) considered by Mississippi's court, and under Mississippi's decisions, Appendix A, the law in Tennessee became applicable first in due course when this Fourth Replication was interposed, and as against this decision there could not be any such thing as "law of the case". *Middlesex Banking Co.* v. *Field,* 84 Miss. 666:

> "It will be observed that I have confined the opinion to a ground not touched in the former opinion of the Court. Field *v.* Banking Co., 77 Miss. 180."

Brewer v. *Browning*, 115 Miss. 358, 76 So. 519; *State* v. *L. & N. Railroad*, 97 Miss. 35, 51 So. 918, 104 Miss. 413, 61 So. 425, 107 Miss. 507, 65 So. 881.

In *Sperry's Estate* v. *Sperry*, 196 So. (Miss.) 653, the rule is stated in Syllabus 2:

> "Where a case is reversed and remanded generally by the Supreme Court, it is tried de novo in the lower court, and additional pleadings may be interposed and additional evidence may be offered on the pleadings."

At page 656:

> "Where a case is reversed and remanded generally by this Court, it is in the lower court tried de novo. Additional pleadings may be interposed and additional evidence on the pleadings" (citing cases).

(4) *What the law of Tennessee was as a fact was not in issue until the present appeal.*

The decision on demurrer was not in any way controlling. *Central Trust Co.* v. *Meridian Light & Railway Co.*, 64 So. 216, 46 So. 415.

(5) *When, pursuant to remand, the State court accepts as binding that precedently determined in this Court, the construction thereafter of the local law—without challenge as to its validity, is not a Federal question.*

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining, etc., Co.*, 243 U. S. 95, 61 L. Ed. 616.

In note, 74 A. L. R. 716, the rule is thus stated:

> "It is quite generally accepted that where the statute of the situs is merely construed in the court of the forum, without a denial of its validity, though it be construed erroneously, particularly in the absence of a construction of the statute by the courts of the situs, such a construction does not deny to the statute the full faith and credit required by the Constitution, and hence a litigant cannot complain that his rights acquired

> under the laws of another state were not recognized or enforced by the courts of the forum" (citing cases).

Furthermore, as at the date of the prior appeal, *Swift* v. *Tyson,* 16 Pet. 1, 10 L. Ed. 865, was operative here, and thereunder, as to this principle of general commercial law, this Court would have applied its independent judgment, but presently must apply the Tennessee decisions under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78, 82 L. Ed. 1188, 1194, where it is said:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

So that the rule of law applicable here has thus been fundamentally changed and, therefore, when Mississippi's court recognized the mandate of this Court, to consider naught but Tennessee law, it did its full duty, and having so done, under the authorities, no Federal question presently exists.

b. In re: Blake, 175 U. S. 114, 44 L. Ed. 94:

This case is next cited by appellant, but it merely held that mandamus would not lie to compel the Supreme Court of Tennessee to conform to what the petitioner there believed to have been established by this Court.

Here, no statute of Mississippi is involved as on the former appeal. Mississippi's court has given full effect to delete Mississippi Code Sections 2294 and 5131, and having so done, considered this contract solely under Tennessee's laws. This Court by its mandate on the prior appeal merely enjoined upon Mississippi's court, if the contract sued on were a Tennessee contract under the facts validly effected, *Osborn* v. *Ozlin,* — U. S. —, 84 L. Ed. 709, to apply the Ten-

nessee law. This Court was not requested to construe the Tennessee law, nor to apply the Tennessee law, nor adjudicate the rights of the parties thereunder further than it was requested to remove from consideration Mississippi's statutes, which were without effect thereasto. On the second appeal to Mississippi's court, the Tennessee law alone was looked to and construed, it being admitted that such law was, under the Fourth Replication, that solely applicable, and therefor this then became a question of construction, naught else.

In *Allen* v. *Alleghany Co.*, 196 U. S. 458, 49 L. Ed. 551, there was a motion to dismiss and plaintiffs in error pleaded that the note upon which suit was brought was executed in New York and that under the laws of that State, no foreign corporation could do business without a certificate of the Secretary of State that it had complied with all of the requirements of the law and that no such corporation could sustain any action in the State without complying with conditions. The Supreme Court of New Jersey held that though not enforceable in the courts of New York and Pennsylvania, it might be enforced in New Jersey and plaintiff in error insisted that under the full faith and credit clause, there was a denial as to the statutes of New York in contravention of the constitution. This Court said:

> "In several cases we have held that the construction of a statute of another state, and its operation elsewhere, did not necessarily involve a Federal question. The case is practically governed by that of Chicago & A. R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519, 7 Sup. Ct. Rep. 398."
>
> * * * * * * *
>
> "Since the above case we have repeatedly held that the mere construction by a state court of a statute of another state, without questioning its validity, does not, with possibly some exceptions, deny to it the full

faith and credit demanded by the statute in order to give this court jurisdiction" (citing cases).

In *Smithsonian Institution* v. *St. John*, 214 U. S. 19, 53 L. Ed. 892, this Court said:

> "On the other hand, it is settled that the mere construction by a state court of the statute of another state, without questioning its validity, does not deny to it the full faith and credit demanded by the constitutional provision (citing cases)."

In *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273, Mr. Justice Brown said:

> "Whether the supreme court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of Banholzer *v.* New York L. Ins. Co., 178 U. S. 402, 44 L. Ed. 1124, 20 Sup. Ct. Rep 972, and in principle by Glenn *v.* Garth, 147 U. S. 360, 37 L. Ed. 203, 13 Sup. Ct. Rep. 350; Lloyd *v.* Matthews, 155 U. S. 222, 39 L. Ed. 128, 15 Sup. Ct. Rep. 70. To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.
>
> "The validity of the New York statute was not called in question. The case turned upon its construction. This was not a Federal question. Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169; Baltimore & P. R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, 9 Sup. Ct. Rep. 503.
>
> "The writ of error is dismissed."

The *Blake* case is likewise distinguishable upon the grounds urged, *supra*, as to the *Chaffin* v. *Taylor* case (116 U. S. 567, 29 L. Ed. 727).

c. Appellant next relies upon *Georgia Ry. etc. Co.* v. *City of Decatur,* 297 U. S. 620, 80 L. Ed. 926. With deference, this case directly supports appellee's contention. Said this Court:

> "After notice to the parties, the Supreme Court, with felicitous recognition of obligation to do nothing in conflict with the ruling here, again considered the original record. September 30, 1935, after disclaiming any purpose theretofore to construe the pertinent State statutes as unhappily chosen words had led us to conclude, it announced their meaning and once more affirmed the decree of the trial court. 181 Ga. 187, 182 S. E. 32. A second appeal gives us jurisdiction.
>
> "Appellants insist, first, that the decree presently challenged is not consistent with our opinion and mandate; and, second, that, if the Georgia statutes be construed and applied as finally ruled by her Supreme Court, they will be deprived of equal protection and due process of law, contrary to the Fourteenth Amendment.
>
> "As appears from our opinion of April 29, 1935, following long established doctrine, we accepted the construction of the statutes placed upon them by the Supreme Court and decreed accordingly. Elmendorf *v.* Taylor, 10 Wheat. 152, 159, 6 L. Ed. 289, 292; Chicago, M. St. P. & P. R. Co. *v.* Risty 276 U. S. 567, 570, 72 L. Ed. 703, 706, 48 S. Ct. 396. So regarded, they empowered the municipality to assess paving costs against the utility only upon the basis of benefits received. And, as appellants had been deprived of opportunity to show the absence of advantage, we held due process of law had been denied.
>
> "After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants

of a federal right. We suggested no interpretation of our own, and did not affimatively indicate the further action to be taken. Schneider Granite Co. *v.* Gast, 245 U. S. 288, 291, 62 L. Ed. 292, 295, 38 S. Ct. 125. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly."

Mississippi's Court, pursuant to the mandate of this Court, deleted Mississippi's statute and construed Tennessee's laws, assuming them to be valid, and this contract to be governed thereby.

This Court is jealous of its jurisdiction, saying in *Southwestern Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 212, 82 L. Ed. 755:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it (Citing cases)."

Further, in *Glenn* v. *Garth*, 147 U. S. 360, 37 L. Ed. 203, at pages 368—206, the Chief Justice said:

> "If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction

would be enlarged in a manner never heretofore believed to have been contemplated.

"The distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this court. Baltimore & P. R. Co. *v.* Hopkins, 130 U. S. 210 (32:908) and cases cited. In Grand Gulf R. & Bkg. Co. *v.* Marshall, 53 U. S. 12 How. 165 (13:938) the case was brought up from the supreme court of Louisiana, and involved an assignment by a corporation of Mississippi under the laws of that state. Mr. Chief Justice Taney, delivering the opinion of the court, after stating that, 'in order to give this court jurisdiction the record must show that the point was brought to the attention of the state court and decided by it,' for the obvious reason that 'the party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the Constitution or laws of the United States; but if he omits to claim it in the state court there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for anything that appears in the record the judgment of the state court might have been in his favor if its attention had been drawn to the question,' goes on to say that 'it appears that the decision turned upon the construction (not the validity) of the act of Mississippi of 1840; and upon a question of merely local law, concerning the right by prescription claimed by the trustees. Nothing is said in relation to the constitutionality or validity of this act of Mississippi, and the opinion of the court clearly shows that no such question was raised or decided.' The writ of error was therefore dismissed for want of jurisdiction. It does not seem to have occurred to the Chief Justice that the writ could be maintained upon the ground of a denial of full faith and credit to the Mississippi statute by the construction given by the Louisiana court."

Appellant did not demur to the Fourth Replication as it did to the precedent three replications, but voluntarily took in the lower court precisely the same view thereof as was

taken by Mississippi's Supreme Court, conceding that if under the proper construction of Tennessee's decisions there was liability, then thereunder appellant was liable, and the Mississippi Court, construing said Tennessee law (admitting its applicability and validity), as directed, did not in so construing, determine any Federal question, but conformed strictly to the mandate given, frankly, going further than Mississippi's court was required to go, this Court having said of this decision in *Osborn* v. *Ozlin*, — U. S. —, 84 L. Ed. 709:

> "(This contract) *validly made* in Tennessee, could not be subsequently enlarged by Mississippi to do as to a condition of 'substantial importance' when suit was later brought on the policy in Mississippi, simply because 'the interest insured was in Mississippi when the obligation to indemnify * * * matured, and it was * * * (the company's) duty to make payment there.' 292 U. S. at 149, 78 L. Ed. 1181, 54 S. Ct. 634, 92 A. L. R. 931. At the time the contract was entered into Mississippi had no interest in the risk covered. The court felt that, even at the time of suit, 'performance at most involved only the casual payment of money in Mississippi,' *Id.* 292 U. S. at 150, 78 L. Ed. 1182, 54 S. Ct. 634, 92 A. L. R. 931, and that was an interest so subordinate to that of Tennessee that the latter was entitled to have the right of way. No question was thus involved touching the right of a state to regulate companies doing business within its borders as to contracts of insurance covering local risks."

When appellee took issue thereon, it developed that appellee had never qualified to do business in Tennessee and under Tennessee's decisions could not appear therein as a corporate entity. *Campbell-Moss-Johnson* v. *Lupton*, — Tenn. —, 290 S. W. 992, 51 A. L. R. 374, note 384, 390. And thereby it may well have been presumed, appellee being without corporate power, that the parties intended to make

the contract lawful by *situsing* it in Mississippi. *Pritchard* v. *Norton,* 106 U. S. 124, 136, 27 L. Ed. 104, 108; 11 *Am. Juris.,* 405; 2 *Beale, Conflict of Laws,* 1165, Sec. 332.49. But Mississippi's court, under appellant's admission, assumed Tennessee's laws to be solely applicable, and so assuming, in good faith, construed them properly, and thereby no Federal question arose.

Point II.

Appellant's Second Assignment is: "The Supreme Court of Mississippi was in error in holding that under the Tennessee decisions the provision of the bond that any claim thereunder must be made upon the surety within fifteen months after termination of its suretyship for the defaulting employee, was not a condition precedent, compliance with which was essential to a recovery upon the bond."

But thereof,

(a) No point is made under the statement as to jurisdiction;

(b) Where there is mere construction without a challenge of validity, no Federal question arises. *Smithsonian Institute* v. *St. John,* 214 U. S. 19, 35 L. Ed. 872; *Finney* v. *Guy,* 189 U. S. 35, 47 L. Ed. 839; *Glenn* v. *Garth,* 147 U. S. 360, 368, 37 L. Ed. 203, 206.

This precise point was decided adversely to us by this Court in *Canal Commercial Tr. & Sv. Bank* v. *Brewer,* 273 U. S. 638, 71 L. Ed. 816, where Mississippi's court merely construed but did not question a Louisiana statute.

(c) This Court had no jurisdiction under Section 237, Judicial Code, as amended, 28 U. S. C. A., Section 344.

This Section grants jurisdiction—

(a) Where there is "drawn in question the validity of a treaty or statute of the United States * * * the validity

of a statute of any state," when review may be had by appeal;

(b) By Certiorari when there is "drawn in question the validity of a treaty or statute of the United States * * * the validity of a statute of any state * * * or where any title, right, privilege or immunity is specially set up or claimed, by either party under the Constitution, or any treaty or statute of * * * the United States."

On this appeal there is no statute whatsoever in Tennessee, no statute in Mississippi, but only a determination by Mississippi's court as to what the Tennessee decision holds to be the law in Tennessee as to a matter of private contract under an insurance policy. Mississippi's analysis, with deference, of Tennessee's decisions is perfectly correct, but under the decisions of this Court, quoted *supra*, even if it were not, this Court would have no jurisdiction.

WHEREFORE, Mississippi's court having recognized the mandate and deleted from consideration the sections condemned, namely, 2294 and 5131, this Court is without jurisdiction of this appeal, but if therein we err the judgment should be affirmed forthwith because no substantial Federal question not previously fully adjudicated is herein presented.

Respectfully,

MARCELLUS GREEN,
Jackson, Mississippi;
WALTER SILLERS,
Rosedale, Mississippi;
W. C. ROBERTS,
Rosedale, Mississippi;
OSCAR JOHNSTON,
Scott, Mississippi;
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Attorneys for Appellee.

APPENDIX "A".

SUPREME COURT OF MISSISSIPPI.

No. 33674.

HARTFORD ACCIDENT & INDEM. CO. *v.* DELTA & PINE LAND CO., 195 So. 667.

April 29, 1940.

1. *Courts* Key 97(6).

Where in action on fidelity bond, demurrer was sustained to plea relying on policy requirement that claim be made within five months after termination of the suretyship, on ground that such requirement was invalid under Mississippi statutes, but such determination was reversed by United States Supreme Court on ground that Tennessee rather than Mississippi law was applicable, because the contract was made in Tennessee though defalcations occurred in Mississippi, a federal question only was involved, and such decision was not 'law of the case' so as to require determination, under replications to the plea, that such requirement was valid under Tennessee law, notwithstanding that courts had assumed that Tennessee law was favorable to insurer. Code 1930, Sections 2292, 2294, 5131; U. S. C. A. Const. art. 1, Section 10; art. 4, Section 1; Amend. 14, Section 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case."

2. *Courts* Key 97(6).

On appeal from decision of Mississippi Supreme Court affirming judgment sustaining demurrer to plea relying on policy provision that was invalid under Mississippi statutes, jurisdiction of United States Supreme Court was necessarily confined to the federal question presented, of whether state Supreme Court had erred in holding that Mississippi statutes rather than Tennessee law should govern contract made in Tennessee, and determination of whether provision requiring claim of loss to be made within a specified time was a condition precedent to liability could not be deemed

a "federal question". Jud. Code Section 237, as amended, 28 U. S. C. A. Section 344.

See Words and Phrases, Permanent Edition, for all other definitions of "Federal Question."

3. *Insurance* Key 539(5).

Where fidelity bond made the sustaining of loss, filing of claim, and proof of loss with home office, and filing of suit within 12 months after making of claim, the only conditions precedent to liability, failure to comply with condition requiring the claim to be made within 15 months after loss merely postponed the time for bringing suit, under Tennessee law, and did not forfeit the right to recover.

4. *Insurance* Key 146(3).

Under Tennessee and Mississippi law, provision making a policy requirement a condition precedent to liability by authorizing forfeiture for failure to comply with such requirement must be either expressed or clearly implied from the terms employed.

ETHRIDGE, *J.*, dissenting.

In Banc.

Appeal from Circuit Court, Bolivar County; Wm. A. Alcorn, Jr., Judge.

Action by the Delta & Pine Land Company against the Hartford Accident & Indemnity Company, to recover on fidelity bond. From a judgment for plaintiff, defendant appeals.

Affirmed.

Shands, Elmore, Hallam & Causey, of Cleveland, and Wm. M. & Wm. G. Hall, of Memphis, Tenn., for appellant.

Sillers & Roberts, of Rosedale, and Green, Green & Jackson, of Jackson, for appellee.

McGEHEE, Justice.

This case was first argued orally before, and submitted to, Division B of the Court for decision, and the judgment of

the court below in favor of the appellee was reversed and the cause dismissed. On suggestion of error, a request was made of counsel to file additional briefs on the question of whether or not a clause contained in the fidelity bond sued on, requiring any claim thereunder to be made within fifteen (15) months after the termination of the suretyship for the defaulting employe, was a condition precedent to liability. This point had been raised in the *fourth* replication filed in the trial court, by the appellee to the plea of the appellant, and that court had held that the right of action could not be defeated, "unless there is some forfeiture in the bond, or there is some stipulation that there will be no liability." In the opinion rendered by Division B as aforesaid, as reported in 188 So. 539, it was said that *three* replications to the appellant's plea had been filed in the trial court. The substance of the first three replications was then set forth in the opinion, and it was held that the demurrers thereto should have been sustained. These three replications merely set forth anew, and also urged additional grounds for, the contention theretofore made by the appellee on a former appeal of the case to this Court, as reported in 169 Miss. 196, 150 So. 205; and to the Supreme Court of the United States, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, to the effect that the rights of the parties under the fidelity bond sued on were governed by sections 2294 and 5131 of the Mississippi Code of 1930 and the decisions of our Court, instead of the laws of the State of Tennessee; whereas, the fourth replication raised for the first time the specific issue of whether or not, even under the Tennessee decisions, a compliance with the clause of the fidelity bond, relied on in appellant's plea as a bar to recovery, was made a condition precedent to liability, as will be hereafter shown. In the opinion rendered by Division B on the present appeal, 188 So. 539, supra, no reference was made to this fourth replication, nor was the point involved therein specifically discussed or decided, on account of the fact that the briefs of counsel were largely devoted to reargument of the questions again raised by the first three replications, which had been settled adversely to the appellee's contention by the decision of the United States Su-

preme Court, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, supra, reversing the decision of this Court on the former appeal, as rendered in 169 Miss. 196, 150 So. 205, supra. Upon consideration of the suggestion of error and briefs thereon, the opinion rendered by Division B, as aforesaid, was withdrawn, the judgment of reversal set aside, the cause remanded to the docket for argument before Division A, and thereafter submitted for decision by the Court in banc.

The appellant Indemnity Company contends that the appellee was precluded by the law of the case from raising the issue presented by its fourth replication to the appellant's plea, after the remand of the case to the Circuit Court of Bolivar County for further proceedings not inconsistent with the opinion rendered by the Supreme Court of the United States aforesaid; also, that under the laws of Tennessee its plea is good, and was sustained by the proof. To determine these two questions it is necessary to first state the issue involved on the former appeal here, and the federal question presented to the Supreme Court of the United States when it reversed the former decision of this Court; and second, to review the decisions of the Tennessee Court and the law as stated by the text writers on the question of whether or not a non-compliance with the provision of the fidelity bond relied on as a defense to the suit is a condition precedent to liability, or whether a failure to comply therewith merely serves to postpone the right to sue.

On the former appeal the appellee had recovered a judgment against the appellant Indemnity Company for the sum of $2,703.79 because of the alleged default of H. H. Harris, who was listed in a fidelity bond as the treasurer of the appellee, employed in its office at Memphis, Tennessee, and whose honesty and fidelity, was insured to the extent of any defalcations, committed in any position, anywhere, not exceeding the sum of $25,000, and which bond was entered into and consummated in the state of Tennessee, where the appellee then had its principal office, and where the appellant Indemnity Company maintained a local office.

The declaration alleged that subsequent to the execution and delivery of the contract of indemnity at Memphis, the

appellee moved its office to Scott, Mississippi, where the defalcations of Harris occurred on various dates between May 9, 1929, and September 20, 1929, all in Bolivar County, Mississippi, where the appellee was then engaged in conducting a large planting operation as its principal business. That these defalcations were not discovered in the exercise of due diligence until May 24, 1931, when notice was given immediately to the appellant. That within three months thereafter affirmative proof of the loss was filed with the appellant at its home office at Hartford, Connecticut; and the suit was filed within twelve (12) months of the filing of the proof of loss, as required by the policy.

The contract of indemnity was terminated on December 31, 1929, and the appellee had not made its claim until June 22, 1931, which was more than fifteen months after the termination of the contract of suretyship, but within thirty (30) days of the discovery of the shortage, according to the allegations of the declaration.

The appellant filed a plea to the declaration, to the effect that the cause of action could not be maintained for the reason that the contract contained the additional clause which provides that, "Any claim must be duly made upon the surety within fifteen (15) months after the termination of the contract of suretyship for the defaulting employee, * * *." And the plea averred that plaintiff did not make claim for its loss within the time above required. That, wherefore, the plaintiff should not have its action against the defendant for the reason that the fidelity bond sued on is a Tennessee contract, and is governed by the laws of that state. That, therefore, full faith and credit must be given thereto in the courts of Mississippi under the requirements of article 4, section 1, article 1, section 10, and section 1 of the Fourteenth Amendment to the Constitution of the United States, since there is no statute in Tennessee which prohibits the limitation aforesaid in such contracts of insurance or indemnity, and averred that the highest court of Tennessee, in the cases of Guthrie *v.* Indemnity Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Co. *v.* Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; City of Bristol *v.* Bostwick, 146 Tenn. 205, 240 S. W. 774, and other deci-

sions of that court not cited in the plea, had held that such a limitation was valid and binding.

Instead of replying to this plea by saying that while it is true that the provision in the bond, non-compliance with which the defendant had set up therein as a defense, is valid and binding under the decisions of the Tennessee court, and not prohibited in such contracts by any statute of that state, it did not constitute a condition precedent to liability, since the contract did not so provide, nor provide for a forfeiture in the event of a failure to comply therewith—the plaintiff saw fit not to then file a replication to the legal conclusion contained in the defendant's plea of the effect of the Tennessee decisions, or to plead the fact, to be disclosed by the evidence, that the contract contained no clause providing for a forfeiture for failure to make claim for the loss within fifteen (15) months after the termination of the contract of suretyship, or clause making the filing of the claim within that time a condition precedent to liability, but demurred to the plea and assigned the following grounds:

"1. The construction and validity of the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after the termination of the suretyship for the defaulting employee is not determined by the laws of the state of Tennessee but is determined by the laws of the state of Mississippi.

"2. The statutes of limitations of the state where the suit is brought is the statute of limitations which governs the time within which actions may be brought, and the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee is in violation of section 2294 of the Mississippi Code of 1930 (section 2491 of Hemingway's 1917 Code of Mississippi), and in violation of the public policy of the state of Mississippi, and the courts of this state are not required to give full faith and credit to said provision under and in accordance with the requirements of article 4, section 1; article 1, section 10

and section 1 of the Fourteenth Amendment of the Constitution of the United States as contended in defendant's said plea."

The Circuit Court of Bolivar County having sustained this demurrer, the defendant Indemnity Company declined to plead further, and the judgment was thereupon rendered against it for the alleged defalcations of the plaintiff's employee, Harris, in the sum hereinbefore mentioned. On the appeal here, as reported in 169 Miss. 196, 150 So. 205, supra, the Court affirmed the judgment of the Circuit Court, on the ground that section 5131 of the Mississippi Code of 1930, defining insurance, rendered the fidelity bond sued on a contract of insurance, and solvable under the laws of this state, though made in Tennessee, since the statute provides that, "All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein;" and, further, that in view of the fact that section 2292 of said Code provides that, "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after," and section 2294 thereof renders null and void any change in this limitation by contract between the parties, the plea constituted no defense to the suit. In so holding that these statutes rendered the contract solvable under the laws of Mississippi instead of Tennessee, our Court was adhering to its former decisions in that regard, whereby the Court, as observed in the opinion referred to, had committed itself to the proposition that a contract of insurance on an interest in this state, although the contract be made in another state, was to be determined by the laws of our own state; and cited in support thereof the cases of Fidelity Mutual Ins. Co. *v.* Miazza, 93 Miss. 18, 46 So. 817, 136 Am. St. Rep. 534; Stuyvesant Ins. Co. *v.* Smith Motor Sales Co., 135 Miss. 585, 99 So. 575, which so held. Hence, the appellee was entitled to assume on that appeal that the only question presented to the Court here for decision on the declaration, plea, and demurrer was whether these Mississippi statutes and decisions would govern the rights of the parties to the contract of suretyship sued on, or

whether they were to be governed by the laws of Tennessee, since the limitation in controversy would be unenforceable under the statutes and decisions of the state of Mississippi, if applicable, without regard to whether or not the limitation constituted a condition precedent to liability under the laws of Tennessee. Neither do the briefs, as officially reported in the case on the former appeal, 169 Miss. 196, 150 So. 205, supra, show that the contention was made therein that the provision in the bond, requiring any claim thereunder to be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, was a condition precedent to liability under the laws of Tennessee; nor is there a Tennessee case cited in the briefs. The only decisions of that Court referred to at all are those listed in the appellant's plea, and they do not sustain the affirmative of that proposition, as will be hereinafter shown. In other words, the sole question presented by the plea and demurrer, and argued in the briefs at that time was the question of whether or not the laws of Mississippi could be integrated into this Tennessee contract. This was the issue presented by the declaration, plea and demurrer, and no other question was properly before the Court for decision.

From that decision the case was appealed to the Supreme Court of the United States, and the sole grounds of error assigned were:

"The Supreme Court of Mississippi erred in holding, that under section 5131 of the Mississippi Code of 1930 the bond or policy of insurance sued upon, made and to be performed in Tennessee, was to have been deemed to have been made in Mississippi and solvable under the laws of Mississippi because upon an interest in Mississippi, and therefore under section 2294, Mississippi Code of 1930, the provision of said bond of policy that claim thereunder must be made upon the surety within fifteen months after termination of the suretyship, valid under the Laws of Tennessee, was null and void because in conflict with the limitation on actions upon such contracts prescribed by the laws of Mississippi, in that said statutes in such construction and ap-

plication were made repugnant to Article IV, Section 1 and Section 1 of the 14th Amendment to the Constitution of the United States.

2. "The Supreme Court of Mississippi erred in holding that the bond or policy sued upon was upon an interest in the state of Mississippi."

The Supreme Court of the United States thereupon reversed the decision of this Court, and remanded the cause for further proceedings not inconsistent with its opinion. Hartford Accident & Indemnity Co. *v.* Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928. Upon such remand the Supreme Court of this state remanded the case to the Circuit Court of Bolivar County, without any further opinion.

(1) The question at issue before the United States Supreme Court is clearly indicated in the syllabi of the case, as being a federal question only. See 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, as follows:

"A state may, without violating the due process clause, limit or prohibit the making of certain contracts within its own territory; but cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.

"2. A state may not, in an action based upon a contract lawful where made and operative, enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.

"3. A state may not, without violating the due process clause of the Federal Constitution, apply to an employee's fidelity insurance contract, entered into in another state, its own statute annulling any contractual limitation of the time for giving notice of claim, although the default occurred after the removal of the insured and his defaulting employee to the state in which the action is brought."

(2) Moreover, the jurisdiction of that court was necessarily confined to the federal question presented by the appeal, that is to say, whether the Supreme Court of Mississippi had erred in holding that the Mississippi statutes referred to, instead of the laws of Tennessee, should govern this contract made in Tennessee. Judicial Code, Sec. 237, as amended, 28 U. S. C. A. Sec. 344, Simpkins' Federal Practice 3rd Ed., section 953, page 283, Brinkerhoff, etc., Co. *v.* Hill, 281 U. S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, 1113. Most assuredly, the issue of whether a provision in a contract of indemnity requiring a claim of loss to be made within a specified time, was a condition precedent to liability could not be deemed a federal question. Having determined that the bond sued on was a Tennessee contract by virtue of having been executed and delivered in that state, and was not changed into a Mississippi contract by virtue of our statutes and decisions because of the fact that the defalcations occurred here where the services of the employee were being rendered, and that therefore the laws of Tennessee should have been applied by the state court in determining the effect of the provision of the contract, the non-compliance with which was set up in the plea of the indemnity company as a defense, it is to be assumed that the Supreme Court of the United States in so holding and in remanding the case for further proceedings had in contemplation that the plaintiff in the trial court would be required to reply to the plea, since its demurrer thereto had been held to be without merit, and that both the trial court and this Court would then be called on for the first time to construe and apply the laws of Tennessee in deciding whether a compliance with the provision set forth in the plea constitutes a condition precedent to liability.

It is true that this Court on the former appeal, 169 Miss. 196, 150 So. 205, 206, supra, when the appellee therein was relying solely on the issue raised by its demurrer, the grounds of which are hereinbefore fully set forth, erroneously assumed and stated that: "It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation

of action"; and that the Supreme Court of the United States, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, supra, seemed to have been thereby caused to make the same assumption, without either court having discussed in their respective opinions the Tennessee decisions mentioned in the plea, and where the only issue raised by the plea and demurrer, or argued in the briefs, was the federal question of whether the law of Mississippi or that of Tennessee should govern the rights of the litigants. In other words, the demurrer, as appears from the grounds assigned therein, raised the sole question of whether or not the Tennessee decisions had any application, and did not present the question of the interpretation of the meaning and effect of those decisions. The demurrant was entitled to have determined the question of whether the laws of Tennessee should be applied before being required to argue what effect should be given to the laws of that state when applied. The appellant Indemnity Company recognized that the sole issue presented to the state Court on the former appeal was whether the Mississippi statutes and decisions could be integrated into what, according to its contention, was a Tennessee contract, as shown by its brief, 169 Miss. on pages 197 and 198, 150 So. 205 of the reported case on the former appeal.

It was held in the recent case of McGoldrick, Comptroller of the City of New York, *v.* Compagnie Generale Transatlantique, 60 S. Ct. 670, 672, 84 L. Ed. —, decided by the Supreme Court of the United States on March 25, 1940, that: "It is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon the courts below. Blair *v.* Oesterlein Co., 275 U. S. 220, 225, 48 S. Ct. 87, 88, 72 L. Ed. 249; Duignan *v.* United States, 274 U. S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996." And, in the course of its opinion, the Court further stated: "In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erro-

neous and error is not to be predicated upon their failure to decide questions not presented." The question of whether or not the requirement of the bond in controversy was a condition precedent to liability, under the Tennessee decisions, not having been presented by the demurrer, or argued in the briefs on the former appeal, should not be deemed to have been decided by the state Court when it affirmed the judgment of the trial court in sustaining the demurrer; but rather that the Court merely assumed that the proposition was to be conceded in the absence of an argument by the appellee to the contrary—an argument which the appellee was not required to make until after the federal question presented by the demurrer should have been first disposed of adversely to its contention, since a favorable decision in all the courts sustaining the demurrer would have rendered immaterial the decisions of the Tennessee Court on the question of whether the provisions of the bond involved was a condition precedent under the laws of that state.

The ultimate decision reached having been adverse to the contention of the appellee on the federal question involved, he was then required for the first time to reply in the trial court to the plea which invoked the limitation of fifteen (15) months within which the claim for loss was to be filed, by pleading as an affirmative defense thereto that the limitation was neither made a condition precedent to liability by the terms of the contract, nor was there a forfeiture provided for in the bond, in event of failure to comply therewith.

(3, 4) The pertinent provisions of the fidelity bond in question are fully set forth in the opinion of this Court on the former appeal, 169 Miss. 196, 150 So. 205, supra, reference to which is here made to avoid the necessity of again reciting the same in detail; and from which it will be observed that the only conditions precedent to liability is that a loss be sustained, that the claim and proof of loss be filed with the home office of the Indemnity Company, and that the suit be filed within twelve months (12) after the making of the claim, and the filing of the proof of loss.

These conditions were all duly complied with, and the failure to comply with the condition requiring the *claim* to be made within the fifteen months prescribed, only served to postpone, the time for bringing the suit, and did not forfeit the right to recover a loss, provided the claim and proof of loss were submitted before the suit was filed, since a compliance with the latter provision was neither made a condition precedent to liability by the terms of the contract, nor was a forfeiture provided for therein for failure so to do, and one of which provisions must be either expressed or clearly implied from the terms employed, according to the decisions of the Supreme Court of Tennessee, in order to make a failure to comply with such a provision a condition of liability. Continental Fire Ins. Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916; Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362; Smithart *v.* John Hancock Mutual Life Ins. Co., 167 Tenn. 513, 71 S. W. 2d 1059; City of Bristol *v.* Bostwick et al., 146 Tenn. 205, 240 S. W. 779; Guthrie *v.* Conn. Indem. Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Co. *v.* Royal Indem. Co., 140 Tenn. 438, 205 S. W. 128; Blackman *v.* United States Casualty Co., 117 Tenn. 578, 103 S. W. 784. It is true that these cases hold that such a provision is legal and valid. However, the question here is not whether it is lawful, but what is its effect under the Tennessee decisions when given validity.

The same rule applies under the Mississippi decisions; Fidelity & Depos. Co. *v.* Merchants' & Marine Bank, 169 Miss. 755, 151 So. 373, 154 So. 260; American Nat. Ins. Co. *v.* Waters, 133 Miss. 28, 96 So. 739; Employers' Liability Ass. Corp. *v.* Jones Co. Lbr. Co., 111 Miss. 759, 72 So. 152; and under a decision of the Supreme Court of appellant's domicil, Elberton Cotton Mills *v.* Indemnity Ins. Co., 108 Conn. 707, 145 A. 33, 62 A. L. R. 926; also, 5 Joyce on Insurance, sections 3282, 3283, and 2nd Ed. 548, 33 C. J. 14, section 661, 14 R. C. L. 1327, section 501, Cooley's Briefs on Insurance, 2nd Ed. vol. 7, section 1338 (a).

In the case of Continental Fire Ins. Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 122, 64 A. L. R. 451, 105 Am. St. Rep. 916, the suit was against a fire insurance company for a fire

loss. The policy provided, among other things, that: " 'If fire occur the insured shall * * * within sixty days after the fire, unless such time is extended in writing', make proofs of loss. * * * 'No suit or action on this policy for the recovery of any claim, shall be sustainable * * * until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire.' " The Court said:

"No forfeiture is provided for in the policy for failure to furnish the proofs of loss within 60 days next after the fire, although there are many other acts referred to in the policy and omissions also referred to therein, for which forfeitures are provided.

"In the present case the proofs of loss were furnished within 69 days after the fire, but not within 60 days. The suit was not brought until the expiration of 60 days from the filing of the proofs of loss, and it was brought within 12 months after the fire."

"The rule laid down in Joyce on Insurance applicable to this state of facts is as follows: 'If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some other time prior to commencing the action upon the policy. And this has been held to be true even though the policy provide that no action can be maintained until after a full compliance with all the requirements thereof.' "

The Whitaker case is directly in point. To the same effect is the case of Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362, decided on December 23, 1929. The other Tennessee cases hereinbefore mentioned either expressly made compliance with the provisions in question a condition precedent to liability, or provided for a forfeiture

on failure to comply with the same. And in the case of Blackman *v.* United States Casualty Co., 117 Tenn. 578, 103 S. W. 784, 785 (relied on by the Indemnity Company in the case at bar), the policy not only made compliance with the provision in question a condition precedent, but further provided that "failure of the insured to comply with any provision or condition herein shall forfeit all rights to indemnity."

Under all of the Tennessee decisions referred to in any of the briefs of counsel, the failure to comply, with similar requirements had not been held to defeat liability unless compliance therewith is made a condition precedent thereto, or unless a forfeiture is provided for.

This rule is recognized in 33 C. J. 14, section 661, where it is stated: "If giving notice and furnishing proofs in such time are made conditions precedent to liability on the part of the company, or if a forfeiture is provided for if they are not given in the time fixed, notice and proofs must be given as and when specified in the policy or no recovery may be had, and additional proofs furnished long after the time required by the policy cannot be considered. The courts, however, are reluctant to construe provisions requiring notice and proofs of loss as in the nature of forfeitures, and, where the serving of notice or proofs within the specified time is not expressly made a condition precedent to recovery, and no forfeiture is provided for in case of default in service, notwithstanding forfeitures are stipulated for in case of breach of other requirements of the policy, the failure to serve notice or proofs merely postpones the time of payment and the time for bringing suit, and, if notice and proofs are subsequently served, insured or the insurance claimant may recover on the policy notwithstanding his delay, provided of course the time for suing on the policy has not expired."

See, also, 14 R. C. L., section 501, page 1327, where it is stated: "On the other hand many courts take the position that the requirements in a standard insurance policy that the insured shall give notice and make proof of loss within a certain time are conditions precedent to the right to sue, but failure to comply with such requirements within the

time stipulated does not avoid the policy or work a forfeiture in the absence of a stipulation in the policy to that effect. Such failure merely postpones the day of payment, *provided notice is given and proof of loss is made within such time as will enable the insured to bring his suit within the time limited by the policy.* Especially is this true under a policy which requires notice to be given within a specified time but does not expressly provide that a failure to give such notice shall invalidate all claims under the policy, or where notice was in good faith given a broker through whom the policy was procured and the insurer suffers no loss through a delay due to the broker's mistake. Though a forfeiture is not involved by failing to furnish proofs within the time stipulated they must be furnished within a reasonable time or no recovery can be had."

In Cooley's Briefs on Insurance, 2nd Ed., Vol. 7, page 5770, it is stated: "The weight of authority, however, seems to support the rule that neither a provision that the loss shall not be payable until after the stipulated proofs have been furnished, nor, the provision that no action shall be maintainable until after such compliance with the policy, will render the furnishing of proofs within the stipulated time a condition precedent. Rather do such provisions, by their phraseology, indicate an intention that the payment of loss shall be merely postponed until the proofs are furnished. • • • It would seem to follow, as a necessary corollary from the doctrine that delay beyond a stipulated time will only postpone the liability of the company or the enforcement of the claim, that it will be sufficient in such cases that the proofs are given before the bringing of the action."

The case of Continental Fire Ins. Co. *v.* Whitaker, Tenn., supra, is cited as supporting that text.

In Couch's Ency. of Ins. Law, vol. 7, section 1538 (a), it is said: "Nor will a clause providing for a forfeiture for failure to furnish proofs within a specified time be read into a contract, although the policy, in another place, provided that no action shall be brought until after 'full compliance by the insured with all of the foregoing requirements.' In fact, when there is no express forfeiture provision in the

policy, the failure to make proof in the time required thereby merely postpones the time of bringing the suit."

The three Tennessee cases cited by the Indemnity Company in the case at bar in its plea that the failure to present the claim within fifteen months of the termination of the suretyship for the defaulting employee defeated liability, are: Guthrie *v.* Indemnity Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Co. v. Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; and City of Bristol *v.* Bostwick, 146 Tenn. 205, 240 S. W. 774.

In the Guthrie case the contract of insurance provided (101 Tenn. 643, 49 S. W. 830): "It is expressly understood and agreed that no action shall be maintained nor recovery had for any claim upon or by virtue of this policy after the lapse of one year from the death of said insured, and, if said suit or proceedings for such recovery be not commenced within one year from the date of the death of said insured, it shall be deemed a waiver on the part of all parties concerned of all rights or claims under or by virtue of this policy, and as conclusive evidence against the validity of such claim; and this policy shall be null and void and of no effect, and no person shall be entitled to damages, or the recovery of any money paid thereon."

The contract now before us contains a provision: "No suit, action or proceeding shall be brought by the employer against the surety after the expiration of twelve months after the filing of the proof of loss as above required."

Had this provision not been complied with, the decision of the Guthrie case would preclude a recovery by appellee. But that case has no application here, because the appellee complied with that precedent condition.

In the Phoenix Cotton Oil case, *supra*, the opinion of the Tennesse Court states (140 Tenn. 438, 205 S. W. 129): "But (the contract of insurance) made it a condition precedent of such liability that the former should 'upon the occurrence of any accident covered by this policy give immediate written notice thereof to the company.'" Then the opinion further states that, "By its express terms the giving of immediate notice was made a condition precedent to the right of recovery."

In the case of City of Bristol *v.* Bostwick, supra, the provisions of the policy are not given. Therefore, these three cases are not in conflict with the other decisions of the Tennessee Court, such as the cases of Continental Insurance Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916, and Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362, hereinbefore discussed, nor with the views of the text writers and the decisions of other Courts, including this Court, as reflected in the cases of Fidelity & Deposit Co. *v.* Merchants & Marine Bank, 169 Miss. 755, 151 So. 373, 154 So. 260; American Nat. Ins. Co. *v.* Waters, 133 Miss. 28, 96 So. 739; and Employers' Liability Assur. Corp. *v.* Jones Co. Lbr. Co., 111 Miss. 759, 72 So. 152, hereinbefore cited.

The Supreme Court of the United States having held that the law of Tennessee, and not that of Mississippi, governs the rights of the parties, the appellant takes the position that what was said in the opinion of the Supreme Court of the United States on a point which we think was not raised by the demurrer then before the Court, "Is the law of the case and binding upon this Court, right or wrong;" notwithstanding the fact that neither the State Supreme Court nor the United States Supreme Court on the former appeal had occasion to consider other than the federal question raised by the demurrer as to whether our statutes, sections 2294 and 5131 of the Code of 1930, should be integrated into a contract made in Tennessee, or whether the Tennessee decisions should control. When it was held that the law of Tennessee applies, it follows that it then became the province of the Circuit Court of Bolivar county, Mississippi, and of this Court, to determine what the law of Tennessee is as applied to the contract in question; and that for this purpose the case was remanded for further proceedings.

Finally, the Indemnity Company says that under a very recent case, Massachusetts Mutual Life Ins. Co. *v.* England, 171 Tenn. 104, 100 S. W. 2d 982, 983, the Court has held that: "Proofs of claim is a condition precedent to bringing suit. 33 C. J. 74. And this is true even though it is not expressly provided in the policy that furnishing such

proofs is a condition precedent to suit, or that failure to submit proofs shall operate as a forfeiture of benefits." We observe, however, that the Court only held that the right *to bring a suit* is postponed until the proof of loss is furnished whenever such proof is required and is not waived. That case is in line with the other authorities hereinbefore quoted from. But in the case at bar the proofs of loss required by the bond were furnished, before *the suit was filed,* and the suit was filed within twelve months thereafter, as required by the bond sued on. Hence, the question decided in the case last above mentioned is not here involved. There is obviously a vital distinction between a postponement of the right to bring suit and being denied the right to recover at all, because the proofs of loss were filed late.

From the foregoing views, it follows that we are of the opinion that the appellee is not precluded either by the law of the case or the decisions of the Supreme Court of Tennessee from a recovery of the loss sued for, and that the judgment of the court below should be affirmed.

Affirmed.

ETHRIDGE, *Justice* (dissenting):

The general statement of the case is contained in Hartford Accident & Indemnity Company *v.* Delta & Pine Land Company, 169 Miss. 196, 150 So. 205, Miss., 188 So. 539, and in 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928. The case as originally decided in these former hearings, except as reported in 188 So. 539, proceeded to hearing on a demurrer challenging a sufficiency of the appellant's plea, setting up that the case was controlled by the Laws of Tennessee, and that under the laws of that state the giving of the notice within the fifteen months was a condition precedent to liability on the policy. A demurrer raised the legal sufficiency of the declaration, and the full contest over what law controlled and what the effect of the law of Tennessee was, if it controlled, was presented there for decision. Our Court held that the demurrer to the defendant's plea was good, but based its holding upon the

opinion that the Mississippi Law controlled rather than the Tennessee Law. This issue as to which law controlled and the effect in the law of the plea in defense of the action was necessarily before the Court for a decision, and the decision was announced in plain terms that if the Tennessee Law controlled, the plea presented a defense. The briefs in the case were addressed largely to the question of which law applied, and it did not dispute the proposition that if the Laws of Tennessee controlled, the plea presented a complete defense. This is clear from the following language used in 169 Miss. 196, 150 So. 205, 206, in deciding the case: "It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation of action. The converse is true in Mississippi, and the provision is a limitation of the action in this case; our statute of limitation being for six years. Section 2292, Code 1930; Sovereign Camp, W. O. W., *v.* Miller, 125 Miss. 502, 87 So. 892; Standard Accident Insurance Co. *v.* Broom, 111 Miss. 409, 71 So. 653 (and other cases). The cases of Berry *v.* Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445, 145 So. 887, and New York Life Ins. Co. *v.* Alexander, 122 Miss. 813, 85 So. 93, 15 A. L. R. 314, are clearly differentiated from the others cited above, and in the case of Berry *v.* Lamar Life Ins. Co., supra, it is pointed out that the limitation there under review was a condition precedent to the liability imposed upon the insurance company, and not a limitation upon the time in which the action should be brought."

On the appeal from this Court to the U. S. Supreme Court, the matter was also before that Court for decision upon the sufficiency of the demurrer to answer the plea of the defendant. If the plea presented no defense, and if the Laws of Mississippi and Tennessee lead to the same result, the case should not have been reversed, but the decision should have pointed out that the theory under which the Mississippi Supreme Court proceeded was erroneous but that its judgment was correct because the result would be the same—applying either law. It was the duty of the Delta & Pine Land Company, on the hearing of the first

appeal in the Supreme Court of this State, to point out that the Laws of Tennessee, properly understood, would lead to the same result, and that consequently the judgment of the Court should have been affirmed because it would be immaterial as to what reason the court below in its holding sustained the demurrer to the plea of the defendant. It was also its duty to point this out to the U. S. Supreme Court because a litigant should not be permitted to argue one ground of demurrer without arguing other grounds or reasons at the same time. In other words, it should not protract litigation by presenting one ground on one appeal and reserve other grounds for argument on a second appeal. When the U. S. Supreme Court reversed and remanded the case to this Court for further proceeding, not inconsistent with its opinion, it was then the duty of the Delta & Pine Land Company to present to this Court for decision at that time its present contention that the Laws of Tennessee, if applied, would lead to the same result, but it failed so to do and permitted a remand to the court below without raising this contention, acquiescing up to this time in the contention of the Hartford Accident & Indemnity Company that the Laws of Tennessee, if applied, presented a complete defense to the suit. It, on the remand, again contended that the Mississippi Laws still applied on another theory set forth in its first three replications to the defendant's plea. Its first three replications were filed on October 4, 1934, whereas, the fourth, so called, replication was filed March 23, 1938, during the progress of the trial of the case. This fourth replication is not in fact a legal replication at all, but is a mere legal conclusion filed as a plea, without any facts upon which issue could be properly taken which would constitute an issue of fact rather than an issue of law. The plea reads, as follows: "And for another and further replication, leave to file, which having been first obtained, plaintiff says that the contract of suretyship herein sued upon did not make it a condition precedent to liability on the part of the defendant that any claim thereunder must be duly made upon the defendant, the surety, within fifteen months after the termination of the suretyship for the defaulting employee, and said contract of

suretyship did not provide that the same should be forfeited in the event said claim should not be made upon the defendant, the surety, within said period of time, and therefore plaintiff should not be precluded from having and maintaining said suit herein."

The contract upon which the declaration was founded contained all of the stipulations with reference to the notice to be given of default within fifteen months after the termination of the policy of indemnity or insurance. A legal effect of the contract, of course, was presented for decision in the plea to the declaration, and the demurrer to the plea of the defendant and the fourth so called replication at most could only be given the effect of a demurrer to the plea of the defendant. It presents nothing new. The issue it undertakes to present now was squarely on the face of the record when the demurrer to the plea of the defendant was originally filed and sustained. It seems to me to be an intolerable condition to allow a demurrer to a plea to be dealt with as to the sufficiency of the plea by piecemeal. The whole question presented by the demurrer and the plea should have been presented on the former hearing. Furthermore, I think that the U. S. Supreme Court, in its decision, supra, considered the Laws of Tennessee applied to and controlled the policy stipulations. The Court, in discussing the case, at page 149 292 U. S., at page 636 of 54 S. Ct., at page 1181 of 78 L. Ed., 92 A. L. R. 928, said:

"A state may limit or prohibit the making of certain contracts within its own territory (Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (5 Inters. Com. Rep. 610); Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 565, 19 S. Ct. 281, 43 L. Ed. 552 (555, 556); New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 398, 399, 20 S. Ct. 962, 44 L. Ed. 1116 (1123, 1124)); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made (New York L. Ins. Co. *v.* Head, 234 U. S. 149, 34 S. Ct. 879, 58 L. Ed. 1259; Ætna L. Ins. Co. *v.* Dunken, 266 U. S. 389, 399, 45 S. Ct. 129, 69 L. Ed. 342, (349)). Nor may it in an action based upon such a contract enlarge the obligations

of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. *v.* Dick, 281 U. S. 397, 407, 408, 50 S. Ct. 338, 74 L. Ed. 926 (933, 934), 74 A. L. R. 701.

"It is urged however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events, loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. * * *"

It is perfectly clear from this language that the U. S. Supreme Court addressed its mind to the contract and determined that it was controlled by the Laws of Tennessee, that it was lawful in Tennessee; and that the controlling stipulation, with reference to the giving of the notice within fifteen months after the termination of the suretyship guaranteeing the fidelity of the employee were of substantial importance under the Laws of Tennessee. The parties presented their contention to the Supreme Court of the United States, as it did to the Supreme Court of this State, upon the theory that if the Tennessee Laws controlled, the plea of the defendant presented a complete defense to the action. Therefore the decisions of the U. S. Supreme Court and our Court constitutes the law of the case and should be applied regardless of whether it was technically correct or not, because, when the Court has

once heard parties in the same cause of action, and solemnly decided the controversy, it should not, without the gravest necessity, change the rule announced in a former decision. It is true that neither the Laws of the United States nor of Mississippi deprive the Court of the power to change its decisions if it is fundamentally wrong and results in great mischief, but it will not ordinarily reexamine what has once been solemnly decided. See Brewer et al. *v.* Browning et al., 115 Miss. 358, 76 So. 267, L. R. A. 1918 F, 1185, Ann. Cas. 1918 B, 1013, so holding; and suggestion of error overruled in Id., 115 Miss. 358, 70 So. 519, L. R. A. 1918 F, 1185, Ann. Cas. 1918 B, 1013; and Mutual Life Insurance Company of New York *v.* Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. Ed. 788. The doctrine of the law of the case is not treated as a limit on the powers of the Court to overrule a former decision in the same case, but that as a matter of practice and policy, it will not ordinarily do so. See Remington *v.* Central Pacific Railroad Company, 198 U. S. 95, 25 S. Ct. 577, 49 L. Ed. 959; also, 22 Harvard Law Review 438; 34 L. R. A. 321; Ann. Cas. 1918 B, 1013.

I therefore think that the law of the case should be applied and judgment of the court below reversed and dismissed. However, the Laws of Tennessee, properly understood, in my opinion, make the failure to give notice under the contract within the stipulated time after the termination of the policy a complete defense to an action brought thereafter; where, as in the present case, there is no contrary provision in the stipulations of the policy calling for specific provisions or making the specific provision by a contract that failure to give one notice would forfeit, and a failure to give notice under another provision of the same policy no stipulation of forfeiture was stipulated. The decisions in Guthrie *v.* Indemnity Association, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Company *v.* Royal Indemnity Company, 140 Tenn. 438, 205 S. W. 128; City of Bristol et al. *v.* Bostwick et al., 146 Tenn. 205, 240 S. W. 774, hold that such conditions or limitations in such contracts are valid and binding, and the said contract of

suretyship contained in the present insurance contract makes the giving of the notice within fifteen months a condition precedent to liability. The policy here involved had its own provision about the time within which suit should be brought after notice was given; and that, of course, is a contract limitation on the time in which suit may be brought. The provision for giving the notice of the default within fifteen months from the termination of the employment, the fidelity of which was insured by the contract, is a contract limitation on liability, and is founded in good reason, and is lawful in Tennessee. It is stated in the case of Massachusetts Mutual Life Insurance Company *v.* England, 171 Tenn. 104, 100 S. W. 2d 982, 983, decided in 1937, that the furnishing of such information is a condition precedent to liability. The object and purpose of the two provisions in the present contract are different, and were embraced in the policy for different purposes. The object of the giving of the notice of the default within fifteen months of termination of the insurance contract was to enable the insurance company to have the opportunity to make an investigation while the facts were obtainable and to take appropriate action to protect its interest, and to recover from the employee insured, if possible, the amount it would lose by its fidelity policy. It is said in the case of Massachusetts Mut. Life Ins. Company *v.* England, supra:

"'The object of the notice is to acquaint the company with the occurrence of the loss, so that it may make proper investigation and take such action as may be necessary to protect its interests.' 33 C. J. 16.

"'The object of the proofs is to furnish the company with the particulars of the loss and all data necessary to determine its liability and the amount thereof.' 33 C. J. 17.

"With hundreds of claims coming in daily, a large insurance company would have a considerable portion of its income expended in court costs and attorney's fees if a claimant could institute suit against it without giving it an opportunity to investigate and determine its liability, and the parties have contracted that the insurer shall have such privilege before suit is begun."

The apparent conflict in the decisions of the Supreme Court of Tennessee is due to the difference in verbiage of contracts. In some of the cases, a contract of insurance specifically declared a forfeiture and non-liability if proof was not furnished within the time specified in such provision; while in other conditions in the same policy, there was no such stipulation of forfeiture for non-compliance. Of course, where a policy contains such provisions with different verbiage, it would be held, as was held in Tennessee, that, stipulating forfeiture in a particular provision while not stipulating forfeiture in a similar provision or condition, it was not the intention of the parties to forfeit for non-compliance in conditions where no provision for forfeiture was contained in the policy. The Court also said, in the case of Massachusetts Mut. Life Ins. Company *v.* England, supra, that the furnishing of such proof is a condition precedent. In some of them a condition precedent to bringing suit. In others a condition precedent to liability. When the language of the contract here involved is set down, it is manifest that it was the intention of the policy to require the notice of the default within the period stipulated, as a condition precedent to liability, and not as a condition for bringing suit. The purpose of such a provision plainly is that the insurance company may have an opportunity to investigate promptly the facts while they are obtainable and while witnesses are available. It is a reasonable stipulation—conducive to fair dealing—and is not prohibited by any Statute of Tennessee.

I do not deem it necessary to take up and analyze the various cases cited in the majority opinion, for, in my opinion, when all of them are examined, and the facts distinguished, all are consistent with the theory that the stipulation for giving notice was a condition precedent to liability. In the case at bar, the facts could have easily been discovered had the books and records of the Delta & Pine Land Company been audited and the vouchers examined in the offices of the company and at the bank where its deposits were made. I think, therefore, that judgment should be reversed and the suit dismissed.

As said in the headnote of the case of Berry *v.* Lamar Life Ins. Company, supra, the "Court will enforce insurance contracts according to their terms, if not prohibited by law or public policy." In the opinion, the Court said: "The life insurance business has become one of the most extensive businesses in the country, and such business depends almost entirely upon contracts. The power to make such contracts as the parties desire to make, when not prohibited by law or public policy, is a fundamental principle of the life insurance business, and is essential to its successful conduct." Of course, the same can be said of all kinds of insurance contracts. The State, under its police power, has extensive authority to regulate insurance and insurance contracts and may prohibit certain types of stipulations in policy contracts, but where there is no prohibition, the parties are free to make their own contracts. The liberty of contract is one of the most important and most essential of all the rights of citizenship. Under the law, as it now exists, corporations have the right to make contracts when not prohibited by law; and, the courts are bound by the contract of the parties where the law has not prohibited or regulated them so as to destroy or mitigate certain types of contracts. The courts must enforce the law as they find it and not as the exigencies of particular cases may seem to make desirable from any standpoint of personal conceptions of justice. Courts are not lawmakers and have no right to invade the rights of the citizenship except as authorized by law.